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IN THE

Supreme Court Of The United States

October Term, 1990

IN RE: STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND
WILLIAM J. GUSTE, JR., IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,
Petitioner

BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether the extraordinary relief of writ of mandamus should be granted to vacate the final judgment of the United States District Court for the Eastern District of Louisiana in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as the attorneys for the State of Louisiana in the litigation.

LIST OF PARTIES

Petitioner in this action is the State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General, and William J. Guste, Jr., in his official capacity as Attorney General of Louisiana. Respondents include Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana; John N. Kennedy; Joseph J. Levin, Jr.; Carla Calobrisi; and the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana.

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BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

The Attorney General for the State of Louisiana has requested that a writ of mandamus issue to the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana, directing him to vacate the final judgment of the United States District Court for the Eastern District of Louisiana in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as the attorneys for the State of Louisiana ("State") in the litigation. Although the Attorney General states that Civil Action Number 90-4109[1] is the subject of his Petition for Writ of Mandamus ("Petition" at 8), Mr. Guste goes on to request that the Court, "issue a writ of mandamus to the district court below[] directing it to vacate its October 30, 1990,

[1] Civil Action Number 90-4109, originally commenced in the Louisiana Civil District Court for Orleans Parish with the filing of the Attorney General's Petition for Declaratory Judgment and Injunctive Relief, was removed by Respondents to federal district court. *See* discussion *infra* at 8, 17-19.

judgment, opinion and order on the representation of the State . . . ." Petition at 30. As is made clear below, the issue of representation of the State was before the district court in both Civil Action Number 80-3300 and Civil Action Number 90-4109. In fact, the issue of representation of the State had been a subject of contention in Civil Action Number 80-3300 since August 1989 and had been scheduled for briefing before the district court in the Fall of 1990, prior to the Attorney General's state court action for declaratory judgment and injunctive relief.

At the time of the district court's determinations, Civil Action Number 80-3300 was before the court on the Attorney General's Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel. Civil Action Number 90-4109 was before the court on the Attorney General's motion to remand to state court. In each action, the Attorney General sought to prevent John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi[2] from representing the State in Civil Action Number 80-3300.

Inexplicably, Mr. Guste's Petition fails to inform this Court that his appeal from the district court's final judgment pertaining to the representation of the State is currently pending before the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in Case Number 90-3864. Mr. Guste filed his brief on the representation issue on April 11, 1991. Thereafter, on April 24, 1991, one day following the filing in this Court of his Petition for Writ of Mandamus, the Attorney General submitted to the Fifth Circuit his Motion to Expedite Appeal and to Certify Questions to the Louisiana Supreme Court ("Motion to Expedite and to Certify") (Appendix at 1a). In an order dated May 15, 1991 (Appendix at 6a), the Fifth Circuit granted Mr. Guste's motion to expedite the appeal. That order reflects that the

[2] On October 16, 1990, the district court granted the motion of Carla Calobrisi (Mr. Levin's former associate) to withdraw as co-counsel. Ms. Calobrisi has neither represented the State of Louisiana or the Governor, nor made any appearance personally or by way of memoranda or other formal filings since February 28, 1990. Despite her withdrawal, Mr. Guste continues to refer to Ms. Calobrisi as a party to the litigation, though he did not object to her request to withdraw or appeal the court's order granting her withdrawal from the case. In a recent filing, Mr. Guste "explained" Ms. Calobrisi's continued presence by stating that she remains a named defendant in the state court action for declaratory judgment and injunctive relief. Ms. Calobrisi's withdrawal, however, renders injunctive relief against her entirely unnecessary.

Attorney General's motion to certify questions to the Louisiana Supreme Court is "carried with the case." Appendix at 6a. Oral argument has been scheduled for July 8, 1991.

OPINION BELOW

On October 30, 1990, the United States District Court for the Eastern District of Louisiana entered its "Opinion and Order on the Representation of the State" in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as "sole trial counsel representing the State of Louisiana in Civil Action Number 80-3300." *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990).

JURISDICTION

Petitioner seeks the extraordinary remedy of writ of mandamus. Jurisdiction is predicated upon 28 U.S.C. Section 1651(a).

STATEMENT OF THE CASE

The Attorney General's Statement of the Case presents only a partial picture of the pertinent facts involved in this matter. Only through a complete review of the facts may this Court fully appreciate the context in which the representation issue was presented to the district court, the egregious conduct on the part of Mr. Guste, and the utter impropriety of the Attorney General's request for the issuance of a writ of mandamus.

In 1974, the United States (the "Government") instituted a lawsuit against the State and other defendants alleging violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. In 1981, without any admission of liability, the parties entered into a Consent Decree which was approved by the United States District Court for the Eastern District of Louisiana. See *United States v. Louisiana*, 527 F. Supp. 509

(E.D. La. 1981).[3] Upon expiration of the Consent Decree, the district court requested that the parties submit motions for summary judgment and, on August 2, 1988, the district court granted the Government's motion for partial summary judgment on the issue of liability. *See United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988). In its Minute Entry dated October 7, 1988, the district court instructed the parties to submit proposed plans to desegregate public higher education in Louisiana, and the case moved into its remedy phase.

Throughout the liability phase of the case, the State was represented by Attorney General William J. Guste, Jr., his staff attorneys and John N. Kennedy, who serves as Special Counsel to Governor Charles E. "Buddy" Roemer, III and as Secretary to the Governor's Cabinet. Additionally, as was noted by the district court, after the case entered its remedy phase, Joseph J. Levin, Jr. was also retained to represent the State with Mr. Guste's knowledge and explicit consent. *United States v. Louisiana*, 751 F. Supp. at 612. Thereafter, on January 18, 1989, Mr. Guste's Assistant Attorney General, Winston DeCuir, filed a motion formally requesting the district court to admit John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi (Mr. Levin's then associate) as additional counsel to represent the State. *See* Motion to Enroll Additional Counsel of Record (Petitioner's Appendix at 59a).[4]

Mr. Guste and his staff, while remaining as co-counsel, took a much less active role during the remedy phase of the litigation. 751 F. Supp. at 612. While Attorney General Guste appeared in the case a number of times during its liability phase, he thereafter made no further appearances until August of 1989, when, after the case's remedy phase was complete, he sought to reverse the State's position on remedy. *See id.* at 612-13. The case, at that time, had been virtually completed in the trial court. On the other hand, Mr. Kennedy's participation in the case on behalf of the State began in the Fall of

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[3] For the earlier history of the case, see *United States* v. *Louisiana*, 543 F.2d 1125 (5th Cir. 1976); *United States v. Louisiana*, 90 F.R.D. 358 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982).

[4] The Motion to Enroll designated Mr. Kennedy and Mr. Levin as trial attorneys, Ms. Calobrisi as additional counsel of record and Mr. DeCuir as resident attorney. *See id.* The district court designated Mr. Kennedy as trial attorney, Mr. DeCuir as local attorney and Mr. Levin and Ms. Calobrisi as additional counsel. *See* Order (dated Jan. 20, 1989) (Petitioner's Appendix at 62a).

1987, continued through the district court's issuance of its final judgments, and included approximately 64 appearances, spanning both the liability and remedy phases. *See id.* at 612. Those appearances included the submission of formal filings to the district court, as well as attendance at hearings, status conferences, depositions, settlement conferences and negotiations, and similar related meetings. After he became involved in the litigation, Mr. Kennedy, along with Mr. Levin, took the lead in the State's representation, drafting documents, filing motions, conducting discovery, attending hearings and presenting evidence on behalf of the State. *Id.*

On August 2, 1989, after the district court had issued its Opinion and Order of July 19, 1989, prescribing the remedy ("Remedial Order"), and while Governor Roemer was out of the country, Mr. Guste suddenly filed a post-trial motion, entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" ("Notice to Join") (Appendix at 7a). *See* 751 F. Supp. at 613. This filing by Mr. Guste surprised most of the parties with the exception of the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University") and its counsel, State Senator William J. Jefferson.[5] The Notice to Join was a surprise because Mr. Guste had never expressed any previous objection to the State's proposed remedy, which was supported by the State, the Board of Regents of the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees") and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), and had been adopted in material part by the district court. Ironically, one of Mr. Guste's fundamental objections to the Remedial Order was, and apparently remains, the creation of a single governing board for public higher education in Louisiana to replace the current four boards. The single board was the principal remedy unceasingly and publicly promoted by the State (and opposed by

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[5] Southern University not only knew Mr. Guste was joining its motion, but Mr. Guste admitted that Senator Jefferson prepared Mr. Guste's Notice to Join and actually filed the motion for Mr. Guste. *Id.* at 613 n.3. *See SU Wrote Guste's Motion*, The Shreveport Times, Sept. 2, 1989, 1A col. ___ (Appendix at 9a); *Jefferson was Convenient for College Case, Guste Says*, The Times-Picayune, Sept. 3, 1989, A-35 col. ___ (Appendix at 12a).

Southern University) for more than nine months with Mr. Guste's knowledge and consent. 751 F. Supp. at 613.

Mr. Guste's challenge to the Remedial Order was also puzzling because in his Notice to Join, the Attorney General designated Senator Jefferson, counsel for Southern University, as counsel to represent the "particular interests of the Attorney General," who supposedly represented the State. *Id.* Throughout the litigation, Southern University had been an opponent of the State and the remaining defendants and had closely aligned itself with the plaintiff. *Id.* Mr. Guste, apparently realizing the blatant conflict of interest created by this designation[6], the next day filed a Motion to Withdraw the "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record ("Motion to Withdraw") (Appendix at 14a). In the Motion to Withdraw, Mr. Guste withdrew his appointment of Senator Jefferson and, instead, renamed certain members of his staff as counsel.[7] These filing began Mr. Guste's crusade to alter the State's position and marked the first activity in the case by Mr. Guste since he and Mr. Kennedy represented the State on the issue of liability.

Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring the matter before this Court. *See* 751 F. Supp. at 614. On August 11, 1989, Mr. Guste filed a Motion for Stay Addressed to Individual Justice, seeking to stay the enforcement of the district court's judgment and orders. The only other party filing an application for a stay in the Supreme Court was Southern University. Simultaneous with his motion for a stay, Mr. Guste filed a Notice of Appeal to this Court from the final decree of the three-judge district court. Notice of Appeal, *State of Louisiana ex rel. William J. Guste, Attorney General of Louisiana*, (dated Sept. 18, 1989).[8] On August

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[6] *See Jefferson was Convenient for College Case, Guste Says,* The Times-Picayune, Sept. 3, 1989, A-35 col. ___ (Appendix at 12a).

[7] At no time did Mr. Guste allege that the Governor's counsel failed to perform their duties properly. Indeed, in his letters of "dismissal" directed to Mr. Kennedy, Mr. Levin and Ms. Calobrisi, Mr. Guste commended their performance. Letters from Mr. Guste to Mr. Levin and Mr. Kennedy (Aug. 11, 1989) (Petitioner's Appendix at 64a).

[8] A separate Notice of Appeal to the Supreme Court was filed jointly by the State, as represented by Governor Roemer, and Regents, Trustees and LSU. Notice of

(Footnote continued on next page)

16, 1989, Mr. Guste, recognizing the highest federal court's authority to make such determinations and offering both federal and state law arguments, asked the Court to remove Mr. Kennedy, Mr. Levin and Ms. Calobrisi as counsel for the State. *See* Motion to Supersede Counsel for State of Louisiana and to Strike Response in Opposition to State's Motion for a Stay Addressed to Individual Justice, *State of Louisiana ex rel. William J. Guste, Jr. v. United States*, No. 89-556 (U.S. dated Aug. 16, 1989) ("Supersession Motion").

The Court granted the motions for stay, pending docketing of the appeals and disposition of the cases by the Court. *Southern University Board of Supervisors v. United States*, 492 U.S. 934 (1989); *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, 492 U.S. 934 (1989). Thereafter, Mr. Guste filed his Jurisdictional Statement with the Supreme Court, purportedly on behalf of the State. Jurisdictional Statement, *State of Louisiana ex rel. William J. Guste, Jr. v. United States*, No. 89-556 (U.S. dated Oct. 5, 1989). A separate Jurisdictional Statement was filed jointly by the State, as represented by Governor Roemer, and Regents, Trustees and LSU. Jurisdictional Statement, *State of Louisiana ex rel. Charles E. "Buddy" Roemer, III v. United States*, No 89-771 (U.S. dated Nov. 15, 1989). Southern University filed a separate Jurisdictional Statement. Jurisdictional Statement, *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, No. 89-557 (U.S. dated Oct. 5, 1989).[9]

Shortly after the appeals were taken to this Court, the district court's decisions pertaining to liability and remedy were also appealed to the Fifth Circuit. The Government and the State filed Motions for

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(Footnote 8 continued)

Appeal, *State of Louisiana ex rel. Charles E. "Buddy" Roemer, III, et al.*, (dated Sept. 29, 1989). Southern University also filed a Notice of Appeal. Notice of Appeal, *Southern University Board of Supervisors*, (dated Aug. 14, 1989).

[9] On January 8, 1990, this Court entered orders, without opinion, that the direct appeals to it from the district court "are dismissed for want of jurisdiction." *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990).

Remand requesting that the action be remanded to the district court for the entry of two further orders: (1) amending the remedial orders to update the time frames for implementation of the remedy; and (2) determining who represents the State in the proceeding. On August 29, 1990, the Fifth Circuit remanded the consolidated appeals to the district court for consideration of those issues. *See* Order, *United States v. Louisiana*, No. 89-3637 (dated Aug. 29, 1990)(Appendix at 18a).

In its Minute Entry of September 21, 1990, the district court ordered Attorney General Guste and counsel for Governor Roemer to submit memoranda, on or before October 9, 1990, briefing the issue of who represented the State in the Title VI proceedings. Appendix at 25a.[10] Pursuant to the court orders, the Attorney General and counsel for the Governor each submitted memoranda addressing the representation issue on October 9, 1990.

Also on October 9, 1990, apparently anxious about the district court's impending ruling on the issue of representation of the State, the Attorney General filed an entirely new action, this time in Louisiana state court. On that date, Mr. Guste commenced in the Louisiana Civil District Court for Orleans Parish the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi.* The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief was whether the Governor or the Attorney General is the proper representative of the State of Louisiana in *United States v. Louisiana*, Case Number 80-3300, the same issue remanded by the Fifth Circuit to the district court and being briefed to the district court at the time of Mr. Guste's state court complaint. In fact, the Citation attached to the Attorney General's state court petition indicated that a show cause hearing had been scheduled in the state court action for October 26, 1990, the very day that briefing to the federal court was to have been completed.

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[10] In a separate Minute Entry dated October 4, 1990, the district court denied the Attorney General's October 2, 1990, motion to schedule a status conference and to alter the briefing schedule set forth in the court's order of September 21, 1990. Appendix at 28a. The court ordered the parties to comply with the September 21 briefing schedule, and further ordered that any reply memoranda must be filed by October 26, 1990.

On October 12, 1990, pursuant to 28 U.S.C. Section 1441, Respondents removed Mr. Guste's state court action to the United States District Court for the Eastern District of Louisiana. The removed action was assigned Civil Action Number 90-4109 and, upon motion by Respondents, consolidated with Civil Action Number 80-3300.[11] On October 24, 1990, the Attorney General filed his motion to remand the removed action and requested sanctions against Respondents. Respondents filed a memorandum in opposition to the motion for remand on October 26, 1990.

On October 30, 1990, the district court entered its final order designating John N. Kennedy and Joseph J. Levin, Jr. as "sole trial counsel representing the State of Louisiana in Civil Action Number 80-3300." *See United States v. Louisiana*, 751 F. Supp. at 620. The issuance of that order necessarily determined the entirety of the Attorney General's declaratory judgment suit and, thus, the district court denied all relief in that suit. *See id.*[12] The district court recognized that while the Attorney General utilized broad language in his supporting memoranda, the Petition for Declaratory Judgment and Injunctive Relief complained of the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi *solely* in connection with Case Number 80-3300. *See* 751 F. Supp. at 620, 621 n.13. The district court went to great lengths to make clear that nothing contained in its order should be construed to prevent the Attorney General from litigating his right to appear as a representative of the State in a matter not involving the Title VI proceeding. *See id.*

[11] Contrary to the assertions in Mr. Guste's Petition, the Notice of Removal and the request for transfer and consolidation filed October 12, 1990, were each served on Mr. Guste (as indicated in the certificates of service attached thereto). *See* Motion to Transfer and Consolidate (Appendix at 29a). There were no *ex parte* proceedings in this case, as claimed by the Attorney General. *See* Petition at 9.

[12] In a separate judgment, the district court, reconsidering its previous decisions in light of the intervening controlling decision in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), *cert. granted, sub nom. Ayers v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991) (consolidated with *United States v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991)), vacated its Order of August 2, 1988, denied the Government's motion for summary judgment, and granted summary judgment in favor of all defendants. *See United States v. Louisiana*, 751 F. Supp. 606 (E.D. La. 1990). The Government's appeal of that judgment, that of Southern University and various cross appeals are pending before the Fifth Circuit in consolidated Case Number 90-3874. On May 6, 1991, the Fifth Circuit granted the Government's motion to stay the appellate proceedings in Case Number 90-3874 pending disposition of *Ayers* before this Court.

SUMMARY OF ARGUMENT

Petitioner has failed to establish any justification whatsoever for the issuance of a writ of mandamus in this matter. On its face, the Attorney General's Petition does not even remotely satisfy the requirements for the issuance of an extraordinary writ.

First, Mr. Guste has failed to show that adequate relief cannot be had in any other form or from any other court. In fact, the Attorney General's appeal of the final judgment he seeks to vacate through his Petition has been expedited and scheduled for oral argument on July 8, 1991 before a panel of Fifth Circuit judges. This fact alone warrants the denial of Mr. Guste's Petition. *See* In *re Sindram*, ___ U.S. ___, 111 S.Ct. 596, 597 (1991); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980).

Second, Petitioner cannot establish that he possesses a clear and indisputable right to the issuance of a writ of mandamus. The district court properly decided the representation issue in the context of both the Title VI case and the removed state action. Mr. Guste has failed in his efforts to show that the district court exceeded the confines of its prescribed jurisdiction by making the determinations and, thus, his attempts to secure the extraordinary remedy of writ of mandamus must also fail. *See Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953). An abundance of law and authority supports the district court's recognition of John N. Kennedy and Joseph J. Levin, Jr. as the proper representatives of the State of Louisiana in this litigation. Indeed, federal law, Louisiana case law, the Louisiana constitution, and Mr. Guste's own conduct in the case demanded such a result.

As to the Attorney General's claims regarding the removed state action, the district court correctly recognized that Mr. Guste's state court petition constituted nothing more than a desperate attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination. *United States v. Louisiana*, 751 F. Supp. at 615. Moreover, despite the Attorney General's assertion that his state court petition presents only state issues, the only facts included in the petition stem from the Title VI action. Thus, Mr. Guste's state court petition clearly sought a

determination of who may practice before the district court and, specifically, who may represent a litigant in a particular federal case. Certainly, only the federal court in which the federal action was pending could make this determination and, thus, the district court acted completely within its jurisdiction by preventing Mr. Guste's manipulative attempt to interfere with the court's proceedings.

REASONS FOR DENYING THE WRIT

A. Petitioner Has Failed To Establish Circumstances Justifying The Extraordinary Remedy Of Writ Of Mandamus.

This Court has instructed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *In re Sindram*, ___ U.S. ___, 111 S.Ct. 596, 597 (1991). *See In re McDonald*, 489 U.S. 180, 184-85 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (citing *Will v. United States*, 389 U.S. 90 (1967)). "Only exceptional circumstances, amounting to a judicial ursurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.*, 449 U.S. at 35. *See Will v. United States*, 389 U.S. at 95. As this Court observed in *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976), the writ of mandamus "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 426 U.S. at 402 (quoting *Will v. United States*, 389 U.S. at 95).

To ensure that a writ of mandamus will issue only in extraordinary circumstances, this Court has required that a petitioner seeking issuance have no other adequate means to attain the relief he desires. *In re Sindram*, ___ U.S. at ___, 111 S.Ct. at 597. *See Allied Chemical Corp.*, 449 U.S. at 35 (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)); *Kerr*, 426 U.S. at 403; Sup. Ct. R. 20.1. Moreover, this Court has required that the petitioner satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). *See Kerr*, 426 U.S. at 403. Showing that a district court committed error

does not satisfy this burden. *Allied Chemical Corp.*, 449 U.S. at 35. Although a simple showing of error may suffice to secure a reversal on direct appeal, to obtain the extraordinary remedy of writ of mandamus, a petitioner must show exceptional circumstances amounting to judicial usurpation of power. *Id.* (citing *Will v. United States*, 389 U.S. 90). The Attorney General has failed to satisfy his burden in this regard and, thus, no writ should issue.

1. Petitioner Has Failed To Satisfy His Burden Of Establishing No Other Adequate Means To Attain The Relief He Seeks.

On its face, the Attorney General's Petition for Writ of Mandamus does not even remotely satisfy the requirements for the issuance of an extraordinary writ. Mr. Guste has made no showing that "adequate relief cannot be had in any other form or from any other court." *See In re Sindram*, ___ U.S. at ___, 111 S.Ct. at 597 (quoting Sup. Ct. R. 20.1).

The Attorney General's bald and inflammatory assertion that this "Court's power to issue the extraordinary writ of mandamus is General Guste's last hope for an immediate and adequate remedy" (Petition at 6), is simply not true. As stated above, Mr. Guste has appealed the district court's final judgment on the representation issue. Oral argument in that appeal has been scheduled for July 8, 1991. Thus, any error committed by the district court can be corrected by the Fifth Circuit. Moreover, with the granting of the Attorney General's request for expedited appeal, it is likely that the issue on appeal will be determined by the Fifth Circuit prior to final disposition of the matter in this Court. Further, Mr. Guste's motion to certify questions to the Louisiana Supreme Court, still pending before the Fifth Circuit, constitutes another possible avenue of relief for Mr. Guste. Therefore, despite the Attorney General's vociferous contentions, the extraordinary remedy of mandamus is clearly not his last hope.

The primary authority offered by Mr. Guste to support his Petition for Writ of Mandamus, *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1 (1st Cir. 1984), is neither controlling nor on point. That action arose when the President of the Senate of Puerto Rico sought to compel the Commonwealth's governor to produce documents for a Senate investigation of alleged police misconduct. *See*

Agosto v. Barcelo, 594 F. Supp. 1390, 1391 (D. P.R. 1984). The Commonwealth's governor removed the case to federal court and the United States District Court for the District of Puerto Rico refused the Senate's request for remand. *Id.* at 1399. Treating the Senate's appeal as a request for writ of mandamus, the United States Court of Appeals for the First Circuit ("First Circuit") found that the action had been improperly removed and that the case was appropriate for the issuance of a writ of mandamus. *Hernandez-Agosto*, 748 F.2d at 4. The First Circuit stressed, however, that it was the *combination* of jurisdictional error and the possibility of harm through further delay which warranted issuance of the writ. *Id.* at 5. The court opined that because the authority of the Senate to conduct the investigation at issue expired with the expiration of the session itself (approximately two months from the date argument was held before the First Circuit), "even a short delay while the district court decides the merits threatens to deprive the Senate of whatever legal remedy the law may give it." *Id.*

Unlike the petitioner in *Hernandez-Agosto*, the Attorney General cannot establish any possibility of harm through further delay. Indeed, Mr. Guste offers no explanation as to how he might be harmed but, rather, makes only obscure references to the need for immediate action.

Respondents are perplexed by the Attorney General's statement that unless the issue is determined immediately, "Louisiana will continue to speak with two voices in an agonizing field which Your Honors have recently agreed to review in the Mississippi case.[ ]" Petition at 2. Mr. Guste offers no explanation of the connection he seems to make between the Mississippi Title VI litigation and the need for immediate relief from the district court's determinations on the issue of representation of the State in the Louisiana Title VI litigation. Indeed, because the district court ruled in favor of the defendants on the merits of the Louisiana Title VI litigation, the position supported by both the Attorney General and the Governor, Mr. Guste's statement that "Louisiana will continue to speak with two voices" makes no sense. Further, since the Fifth Circuit recently stayed the appeal of the final judgment in the Louisiana Title VI litigation, pending this Court's determination in *Ayers*, the Attorney General cannot credibly argue that the denial of this Petition will prejudice him in that appeal.

Moreover, while he speaks of the need for an immediate determination, Mr. Guste's own past actions belie his new found sense of urgency. Prior to his most recent filings, the Attorney General pursued his appeal to the Fifth Circuit in a manner far from expeditious. Not only did Mr. Guste fully utilize the forty day briefing period provided to appellants, he sought and received an additional thirty-one days to prepare his appellate brief. Thus, the Attorney General required a total of seventy-one days to complete his seventy-two page brief on this issue .

In short, Mr. Guste has offered no foundation to support his claim that the issuance of a writ of mandamus constitutes his last hope for an immediate and adequate remedy. Rather, his pending appeal before the Fifth Circuit, recently expedited and scheduled for oral argument on July 8, 1991, is clear evidence that the Attorney General's claim in this regard is simply not true.[13]

2. Petitioner Has Failed To Establish A Clear And Indisputable Right To The Issuance Of A Writ Of Mandamus.

Mr. Guste cannot show that the district court exceeded its prescribed jurisdiction by designating John N. Kennedy and Joseph J. Levin, Jr. as counsel for the State in litigation pending before that court. Thus, Mr. Guste does not have a clear and indisputable right to the issuance of a writ of mandamus. *Allied Chemical Corp.*, 449 U.S. at 35. *See Bankers Life & Casualty Co.*, 346 U.S. at 384. The district court was empowered to decide the representation issue in the context

[13] The Attorney General's Petition, filed in the face of well-settled, applicable Supreme Court authority, has succeeded only in multiplying the proceedings in this matter and in unnecessarily and vexatiously increasing costs to Respondents and to the taxpayers who fund the operation of the judicial process. Mr. Guste's behavior in this regard is even more egregious in light of the fact that, while asserting dire circumstances and claiming that mandamus constitutes his last hope, the Attorney General failed to inform this Court of either his appeal of the district court's judgment or his Motion to Expedite and to Certify, both pending before the Fifth Circuit, and further failed to inform the Fifth Circuit of his Petition for Writ of Mandamus pending before this Court. This type of behavior has resulted in the imposition of sanctions against parties and counsel. *See, e.g., In re Sindram*, ___ U.S. ___, 111 S.Ct. 596 (1991) (Court has duty to deny *in forma pauperis* status to those individuals who have abused the system); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (Court may impose sanctions against party and counsel who willfully abuse the judicial process).

of both the Title VI case and the removed state action. The district court based its decision on several sources of law applied to the pertinent facts in the case. *See United States v. Louisiana*, 751 F. Supp. at 611-14. In reaching its conclusions of law, the district court lawfully and properly exercised its statutory and inherent authority and, thus, the issuance of a writ of mandamus is wholly unwarranted.[14]

a. The Determination Of The Right And Manner Of Counsel Participation Before A United States District Court Constitutes A Federal Question.

The federal district court properly exercised original jurisdiction over the issue of representation of the State in litigation pending before the court. 28 U.S.C. Section 1331 empowered the court to determine the representation issue pending before it in both the Title VI case and the removed state action. That section provides that federal district courts possess original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. Further, removal was appropriate under those same grounds where, pursuant to 28 U.S.C. Section 1441,

> any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

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[14] In his Supplement to Petition for Mandamus (dated May 22, 1991), Petitioner offers a brief discussion of the recent decision in *Primate Protection League v. Tulane Ed. Fund*, 59 U.S.L.W. 4424 (U.S. May 20, 1991) (No. 90-89). Mr. Guste fails, however, to offer any explanation of how that decision relates to his instant request. While *Primate Protection League* sets forth the appropriate procedure to be followed in actions improperly removed to federal court, the limited issue considered by the Court in that case was the scope of the federal statute that permits removal to federal court of civil suits filed in state court against "[a]ny officer of the United States or any agency thereof, or person acting under him" challenging any act under color of such office. 28 U.S.C. Sec. 1442(a)(1). Construing the statute, the Court concluded that Section 1442(a)(1) does not grant removal authority to federal agencies, but only to federal officers. 59 U.S.L.W. at 4425, 4426. Neither the factual pattern nor the issues presented in *Primate Protection League* bears any similarity or relevance whatsoever to the instant action. Accordingly, the Attorney General's reliance on the decision is entirely misplaced.

> district and division embracing the place where such action is pending.

28 U.S.C. Sec. 1441(a).[15]

i). The District Court Possessed Statutory And Inherent Judicial Power To Decide The Issue.

The Attorney General's efforts in both the underlying federal case and the state court action sought to disrupt the orderly resolution of the litigation by seeking to remove counsel for the State. The district court appropriately exercised its statutory and inherent judicial authority and designated the Governor's counsel as sole trial attorneys for the State in the Title VI litigation. 751 F. Supp. at 620. The court's action in this regard is well supported under federal law.

It is axiomatic that a federal district court has both the federal statutory and inherent judicial power to resolve who may be permitted to appear before it, as well as how appearances before the court may be conducted. *See Frazier v. Heebe*, 482 U.S. 641, 645 (1987); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985); 28 U.S.C. Sec. 1654. This authority is particularly vital when the conduct of counsel may obstruct the orderly administration of justice. *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619-20 (11th Cir. 1983); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). Absent such authority and discretion, district courts would fall victim to the whims of counsel attempting to manipulate the court's docket to suit their own agenda. In this case, for example, after lengthy proceedings on the issue of remedy and irrespective of all the judicial time and expense previously in-

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[15] While the district court did not find it necessary to rely upon the alternate jurisdictional grounds found at 28 U.S.C. Section 1441(c), had the court found that there were also issues of state law presented in the Attorney General's state court petition, the removal would have been proper nonetheless under that section. Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein . . . .

28 U.S.C. Sec. 1441(c).

curred, the Attorney General attempted to obstruct the orderly resolution of the case by seeking to change the State's position on remedy and removing its counsel at the last minute, after the case was virtually over. Recognizing the Attorney General's tactics, the district court responded accordingly by denying his motion. *United States v. Louisiana*, 751 F. Supp. at 615.

As to the Attorney General's claims regarding the removed state action, the district court correctly perceived that Mr. Guste's state court petition constituted no more than an eleventh hour attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination. *Id.* Even Mr. Guste's attempt to draft a state court complaint that would escape federal jurisdiction could not succeed in the face of substantial authority prohibiting such thinly-veiled efforts to place federal issues before state courts. *See, e.g., Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (affirming finding that respondents had attempted to avoid removal jurisdiction by "artfully" casting their federal law claims as state claims); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) ("[a] party may not fraudulently evade removal by drafting a complaint so that the true purpose of the law suit is artfully disguised."); *Nowling v. Aero Services Intern., Inc.*, 734 F. Supp. 733, 737 (E.D. La. 1990) (same). Mr. Guste's petition sought to persuade a state court to issue an injunction that would have had the effect of enjoining a federal court from proceeding with a matter remanded to it by the Fifth Circuit.[16]

Even a cursory reading of the Attorney General's state court petition reveals that he sought a determination and an injunction by the Louisiana civil district court that Respondents could not appear in the federal action. As the Attorney General stated, his request for relief sought an injunction:

> enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting . . . . as the lawfully authorized legal representatives of the State of Louisiana . . . , and *in particular* enjoining to act and identify [sic]

[16] The fact that the Fifth Circuit ordered the lower court to consider the issue of the State's representation indicates that the district court did indeed have jurisdiction over the matter and was the proper forum for such a determination. *See* Order, *United States v. Louisiana*, No. 89-3637 (dated Aug. 28, 1990) (Appendix at 18a).

> themselves as the legal representatives of the State of Louisiana in *U.S.A. v. Louisiana*, No. 80-3300 . . . .

Petition for Declaratory and Injunctive Relief (Petitioner's Appendix at 77a)(emphasis supplied). Like the plaintiffs in *Nowling v. Aero Services*, the Attorney General has claimed that his state court pleading raised solely issues of state law, but "[t]o believe that would be to substitute naivete for common sense." 734 F. Supp. at 737.

If anything, Mr. Guste made this even more of a federal question by seeking injunctive relief from a state court as to who may appear before the federal court in the Title VI action. While Congress has authorized courts of the United States to restrain state court proceedings in special circumstances, state courts are completely without power over federal court proceedings. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977). *See Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964); *Meridian Investing & Development Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 372 (5th Cir. 1980). This well-established rule is in no way relaxed because the prohibition is addressed to the parties rather than the federal court itself. *Felter*, 434 U.S. at 17. *See Donovan*, 377 U.S. at 413. The Attorney General's state court petition, though not addressed directly to the district court, constituted a transparent attempt to enjoin the district court from proceeding with a matter remanded to it by the Fifth Circuit. The district court correctly prevented Mr. Guste's manipulative attempt to interfere with the court's proceedings. *See* 751 F. Supp. at 615.

Moreover, despite the Attorney General's assertion that his state court petition presents only state issues, it was Mr. Guste who brought these very issues before the United States District Court in his August 3, 1989, Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel (Appendix at 37a) and before this Court in his August 16, 1989, Supersession Motion (Appendix at 40a).[17] Placing the question of who represents the State before the

[17] The plain language of his Supersession Motion reveals that at that time, the Attorney General was quite willing to have a federal court entertain both his federal and state law arguments pertaining to the representation issue. Although he alludes to the authority of the Supreme Court to certify the representation question to the Louisiana Supreme Court, it was not until much later that Mr. Guste, perhaps anticipating the likelihood of an adverse ruling by the district court, began to assert that the representation issue presented only state law concerns and should be deter-

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United States District Court and before the highest federal court, Mr. Guste could not be allowed to later disclaim the jurisdiction of the district court over the very same issue. The very fact that the Attorney General asked the district court to issue an order accepting his designation of counsel for the State constitutes an admission by Mr. Guste that the district court is empowered with authority to determine who may practice before it.

Simply put, the Attorney General sought a determination from a state court of who may practice before the federal district court and who may represent a litigant in a particular federal case. That is a matter for determination only by the federal court in which the federal action was pending and certainly provides federal jurisdiction sufficient for removal of that issue.

ii). Federal Common Law Supports The District Court's Ruling.

In addition to federal statutory and inherent judicial power, federal common law provided the district court with jurisdiction over the subject matter at issue. Applying the common meaning of the word "law," this Court has concluded that Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory or constitutional origin. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 n.5 (1959).

Federal common law provides, under circumstances such as exist here, that a federal court may indeed decide that a state's governor is the proper spokesman for the state in litigation to which the state is a party. *See, e.g., Graddick v. Newman*, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990) (Westlaw, 1990 WL 265971) (determining that the Governor of Louisiana, not its Attorney General, is the sole representative of the State in legal proceedings involving the State). As the Attorney General is well aware, and contrary to his assertions (Petition at 15),

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(Footnote 17 continued)

mined only in a state forum. *See* Opposition to Motion for Status Conference (dated Apr. 18, 1990) (brief reference to certification and "new 'federalism'"); Opposition to Motions to Remand, *United States v. Louisiana*, No. 89-3637 (dated May 23, 1990) (extended assertion that issue is governed solely by state law).

Graddick has been relied upon by Respondents in this and other litigation to show that federal courts have made determinations such as the one at issue without resorting to state law.[18] For purposes of determining federal question jurisdiction, the value of *Graddick* and *Williams* lies as much in the recognition by federal courts of their authority and, indeed, responsibility to render decisions on this subject as in the substance of the courts' decisions themselves.

In *Graddick v. Newman*, 453 U.S. 928 (1981), this Court ruled that the Governor of Alabama and not the state's attorney general had authority to establish and articulate the position of Alabama in a case involving the stay of a federal district court order pertaining to state prisons. The Alabama attorney general sought to stay a district court order requiring the release of approximately 400 state prison inmates, prior to the expiration of their sentences, as part of the remedy for the state's long-litigated failure to operate its prison system in compliance with constitutional standards. Though a named party in the case, the state attorney general had participated infrequently in the litigation and had not appeared in the action at all for a four-year period. 453 U.S. at 929, 931. During that time, Alabama's primary representative in the lawsuit had been Governor Fob James. *Id.* The governor opposed the attorney general's application for a stay, arguing that he, not the attorney general, properly represented Alabama's interests, much as Governor Roemer has done in this action. *See id.* at 934.

The Court denied the attorney general's application for a stay, because, according to Justice Powell, the attorney general lacked standing inasmuch as Alabama law had vested responsibility for the state's prison system in the governor. *Id.* at 934. Justice Powell's opinion further noted that the Court could not grant the extraordinary, equitable relief requested by the attorney general when he had sought such relief "with unexplained tardiness." *Id.* at 936.[19]

[18] The Attorney General's stance on *Graddick* continues to perplex Respondents, particularly in view of Mr. Guste's recent Motion to Expedite Appeal and to Certify. In that motion, the Attorney General himself cites to a case in which the Fifth Circuit makes the very determination he claims is beyond the jurisdiction of federal courts. *See* Motion to Expedite and to Certify (Appendix at 2a) (citing *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976))

[19] Attempting to minimize the significance of *Graddick*, the Attorney General relies exclusively on the separate opinion written by Justice Rehnquist and ignores completely the opinion by Justice Powell. Petition at 15-16. Once again, Mr. Guste

(Footnote continued on next page)

The instant case is virtually indistinguishable from *Graddick*. Governor Roemer and his counsel actively participated in the litigation as the representatives of the State of Louisiana and all of its citizens, while the Attorney General at times was largely and noticeably absent from the proceedings. The fact that the Alabama attorney general is the state's chief legal officer under state law[20] did not deter the Supreme Court from determining that the state's governor was the proper representative of the state, particularly where, as in this case and *Graddick*, the governor is vested with authority and, indeed, responsibility over the institutions at issue. *See Graddick*, 453 U.S. at 534; *see, e.g.*, La. Const. art. VIII, secs. 5-7; La. Rev. Stat. Ann. Secs. 17:1453, 17:1831, 17:1851. If anything, the Alabama attorney general was in a stronger position than Mr. Guste because the Alabama attorney general was a named party defendant to the action, not, like Mr. Guste, merely co-counsel to a defendant. *See* 453 U.S. at 929-30. Thus, as exemplified in *Graddick*, federal common law supports the district court's decision in this case, both as to the court's authority to consider the issue in the first instance as well as to the substance of Judge Schwartz's determination.

b. Procedural And Ethical Considerations Barred Mr. Guste From Pursuing His Course of Action.

The district court was also empowered to direct Mr. Guste's withdrawal from the case based on his willful violation of procedural and ethical standards. *United States v. Louisiana*, 751 F. Supp. at 616. The Attorney General's actions in the litigation before the district

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(Footnote 19 continued)

perverts the relevance of *Graddick* to this case, that federal courts, including this Court, have not shied away from this issue. Furthermore, while Justice Powell focuses on the Alabama attorney general's behavior and conduct, Justice Rehnquist appears to concentrate on the attorney general's rights as a *party* to the litigation. In determining the representation issue in the context of the Louisiana Title VI litigation, the district court was not faced with a situation in which the Attorney General sought to assert his rights as a party. Rather, the district court was required to determine the proper representative of the State in a particular litigation in which the Attorney General had absented himself, leaving the representation of the State to other counsel, only to attempt much later to resume control of the State's representation while at the same time trying to change the State's position on remedy.

[20] *See* Alabama Code Section 36-15-21 (1975).

court demonstrated conclusively that he not only acquiesced in the representation of the State by John N. Kennedy and Joseph J. Levin, Jr., but that he affirmatively furthered that representation as well. Mr. Guste generally failed to take an active role in the remedy phase of the case and moved Mr. Kennedy and Mr. Levin into the case as State's counsel to conduct the State's defense. Such a deliberate act by Mr. Guste to secure the Governor's representation of the State can only be viewed as intentional and purposeful, rather than mere acquiescence by the Attorney General in that representation. Having failed to object to the Governor's representation of the State, and in fact, having designated the Governor's special counsel, John N. Kennedy, as lead trial counsel, the Attorney General could not be allowed by the district court to assume control over the State's participation in the case, particularly under circumstances where the Attorney General's sole motivation was to change the position asserted by the State (and relied upon by all the parties) during trial, recommended by the Special Master, and adopted in material part by the court.

Mr. Guste was both procedurally and ethically barred from pursuing such a course in the litigation. As this Court has declared, it is an elementary principle of civil procedure that "suitors may not maintain a position here which conflicts with that taken below." *Seney v. Swift Co.*, 260 U.S. 146, 149 (1922). *See Mongoose Gin Co. v. United States*, 331 F.2d 483, 484 (5th Cir. 1964) (new allegations, not raised before the trial court, may not be asserted as a basis for reversal of the trial court's judgment); *Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir. 1962) (defendants' failure to contest allegations "*prior to judgement*" prevents them from doing so after judgment is rendered) (emphasis in original). That is precisely what the Attorney General has attempted to do since August of 1989, as evidenced by the plain language of his Notice to Join (Appendix at 7a). Moreover, under the most basic standard of fair play, Mr. Guste could not be allowed to abandon the State's position after trial and take an adverse position before the district court or any other court.

Despite the Attorney General's attempts to distinguish the case (Petition at 21 n.9), *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 172 Cal. Rptr. 478, 624 P.2d 1206 (Cal. 1981), remains illustrative of the ethical quagmire into which Mr. Guste stepped in the action below. In *Deukmejian*, the California attorney general counseled the

California governor to sign a piece of legislation (an employment relations act) and then advised the state agency charged with implementing the action after the legislation was challenged in court. 29 Cal. 3d at 154, 172 Cal. Rptr. at 479, 624 P.2d at 1207. In a legal about-face, however, the attorney general then sought a writ of mandate from an appellate court against the governor and the state agency to prohibit them from enforcing that statute. *Id.*

The California Supreme Court held that "no constitutional, statutory or ethical authority" existed to support the attorney general in "acting adversely to the position of his statutory clients [the governor and the state agency]." 29 Cal. 3d at 155, 156, 172 Cal. Rptr. at 479, 480, 624 P.2d at 1207, 1208.[21] In reaching its decision, the court relied on Rule 5-102 of the California State Bar Association Rules of Professional Conduct ("California Rules"), which is identical in its meaning to Rule 1.9 of the Louisiana Rules of Professional Conduct ("Louisiana Rules"), and Rule 1.9 of the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules")[22] , and which provides:

> A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.
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> * * *

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[21] The Attorney General's efforts to diminish the applicability of *Deukmejian* fall short. Contrary to Mr. Guste's assertions (Petition at 21 n.9), *Deukmejian* emphasizes that in a situation such as that imagined by Mr. Guste, the correct course of action for an attorney general is to withdraw as counsel, rather than take a position adverse to the state client. 29 Cal. 3d at 153, 172 Cal. Rptr. at 481, 624 P.2d at 1209.

[22] Both the ABA Model Rules and the Louisiana Rules state:

> A lawyer who has formerly represented a client in a matter shall not thereafter;
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former clients unless the former client consents after consultation . . .

ABA Model Rule 1.9; Louisiana Rules of Professional Conduct Rule 1.9.

> A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

In the case at hand, Mr. Guste exceeded the bounds of ethical propriety and fair play to an even greater extent than did the California attorney general in *Deukmejian*. Mr. Guste, along with co-counsel, formally represented the State in the trial court. As noted above, the California Rules, the Louisiana Rules and the ABA Model Rules all contain the same ethical prohibition against taking a position adverse to a client. Moreover, all parties to this action, including the Government, relied throughout the remedial phase of the case upon the State's position in support of the single governing board and the other aspects of the State's desegregation plan. The entire litigation approach taken by the parties would have been markedly different had the position belatedly advocated by Mr. Guste been asserted at trial.

Mr. Guste's ethical breach in this regard is also cognizable under the Local Rules of the Eastern District of Louisiana, which provide that the district court may take appropriate disciplinary action for, *inter alia*, violations of the Louisiana Rules of Professional Conduct. *See* Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, Rule II (Appendix at 44a). Thus, the district court was empowered to order that Mr. Guste discontinue his "representation" of the State in Civil Action Number 80-3300 based on his violation of the State's Rules of Professional Conduct, as incorporated into the court's Local Rules.[23]

The Attorney General's conduct in this action, particularly during the proceedings he brought before this Court, constituted further violations of the Louisiana Rules of Professional Conduct, which prohibit an attorney practicing in the State from knowingly making false statements of material facts or engaging in similar conduct while representing a client. *See* Louisiana Rules of Professional Conduct, Rules 3.3, 4.1 and 8.4 (Appendix at 45a).

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[23] Mr. Guste also attempts to circumvent Respondents' allegations regarding the Attorney General's unethical conduct in this case by drawing an inapplicable distinction between private and public attorneys. *See* Petition at 21 n.9. The authority cited by Mr. Guste is premised on the assumption that the attorney general is the sole legal representative of the state. Such is not the case in Louisiana.

In pleadings filed with this Court, Mr. Guste defended his appeal of the district court's Remedial Order and his request for a stay of that Order by claiming that he "did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court]." *See* Supersession Motion (Appendix at 43a). The absolute falsity of Mr. Guste's assertion regarding the single board issue is easily exposed upon review of that remedy's substantial history in the case. For instance, in 1988, the district court suggested on at least two occasions that a unified governing board was likely to be part of the remedy fashioned in this case. *See United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988); Opinion and Order (dated Nov. 22, 1988). In fact, the Attorney General's own argument in this action admits that he knew, at an early point in the remedial phase, the Governor's position on remedy. Specifically, in his Petition, Mr. Guste states that as an "accommodation to Governor Roemer," he "permitted the Governor's counsel to advocate a single-board remedy before the district court as an alternative remedy under protest . . . ." Petition at 21 n.9. This admission emasculates the Attorney General's prior claims of ignorance as to the Governor's proposed remedy.[24] Moreover, this "accommodation" was never communicated to the Governor, Mr. Kennedy, Mr. Levin, counsel for the Regents, counsel for the Trustees, counsel for LSU, the district court, or any other party to the litigation. Indeed, this assertion by the Attorney General is nothing more than another transparent effort to justify his behavior.

Mr. Guste's explanation for his belated re-involvement in the litigation is also inconsistent with the explanation he offered to the district court in the Attorney General's Notice to Join, in which Mr. Guste claimed that he was duty-bound to provide a defense of the State's four-board, seventy-member governance structure and the laws creating it. *See* Notice to Join (Appendix at 7a). Certainly, to the extent such a duty was present, it existed since the beginning of the remedy phase of the case, months before Mr. Guste belatedly re-entered the case.

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[24] Additionally, the overwhelming media attention given to the proposed abolition of the four boards and the creation of a single board renders Mr. Guste's assertion all the more incredible. Scores of articles were published in newspapers around the State regarding the proposed creation of a single board. *See* Appendix at 47a.

Significantly, Mr. Guste did not argue to the district court, as he did to this Court, that he was "surprised" by the Remedial Order because, as the Attorney General knew, the district court was familiar with Mr. Guste's past participation in the case, his knowledge of the State's position on remedy and, indeed, his acquiescence in that position. This Court, however, did not have the extensive history with the case as did the district court and, therefore, must have seemed to be a safe forum for Mr. Guste to claim that he did not know and could not reasonably be expected to have known that a single board might have been a part of the district court's remedy. Since that time, Mr. Guste has offered no explanation for his prior statements before this Court.

Such a misrepresentation is forbidden by the State's Rules of Professional Conduct, which require candor in an attorney's professional conduct. See Louisiana Rules of Professional Conduct, Rules 3.3, 4.1 and 8.4 (Appendix at 45a). Mr. Guste's violation of these rules provided the district court with additional grounds on which to order the Attorney General's withdrawal from the action. *United States v. Louisiana*, 751 F. Supp. at 616.

c. Louisiana Case Law And The Louisiana Constitution Reject Mr. Guste's Attempt To Exercise Legal Supremacy Over The Governor.

The district court correctly ruled that the Attorney General waived his rights as a matter of federal law. 751 F. Supp. at 617. In reaching this conclusion, it was not necessary for the district court to address issues of state law. Even so, the district court was empowered to conclude that as a matter of clear Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State in this action and, as such, may determine the State's course in this litigation. The Attorney General's reliance upon the doctrines of abstention and comity is inappropriate under these facts. As the district court recognized, were the issue of representation before the district court solely a question of state law and were the state law not so clear, abstention by the district court under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), arguably could have been appropriate. 751 F. Supp. at 617 n.6. *See also Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certifying an unsettled issue of state law to the Massachusetts Supreme Judicial

Court). As the district correctly recognized, however, it was faced with neither condition.

The case law in Louisiana is as consistent at it is clear that the Attorney General is not vested with supremacy over the Governor in articulating the State's position in litigation such as the instant action. The case of *State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So. 2d 756 (La. App. 1st Cir. 1983), demonstrates that the Attorney General's title under the Louisiana Constitution of 1974 as the State's "chief legal officer" does *not* mean that he replaces the Governor as spokesman for the State whenever the Attorney General attempts to enter a legal proceeding.[25] In Texaco, the Governor opposed a claim by a special counsel of the State for the direct payment of his attorney's fees by the trial court. *Id.* at 757. The Attorney General (then and now, William J. Guste, Jr.) responded by challenging the Governor's position. *Id.* at 758.

The Louisiana trial and appellate courts in *Texaco* refused to treat the Attorney General's support of the special counsel's position and the payment of his legal fees as mooting the controversy. Instead of treating the Attorney General as the definitive spokesman for the interests of the State of Louisiana, both courts ruled in favor of "the State's position" as articulated by the Governor. *Id.* at 759.[26]

Again, Mr. Guste misreads the holding in *Texaco* and its applicability in this case. *See* Petition at 23 n.10. *Texaco* has been cited consistently by the State and the district court for the proposition that Louisiana state courts have found that the Governor is the appropriate voice for the State in important litigation such as the instant action. Mr. Guste's discussion of *Texaco* reveals his continued desire to be both the attorney and client, simultaneously representing the State while dictating the State's position in this litigation. This argument is patently flawed, represents a fundamental misunderstanding of the

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[25] *See* Article IV, Section 8 of the Louisiana Constitution of 1974 (Appendix at 59a).

[26] The dispute in *Texaco* was eventually settled and compromised and, on a joint motion and order for dismissal and release of the funds deposited in the registry of the court, the Louisiana Supreme Court dismissed the appeal and intervention. *State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So. 2d 557 (La. 1984). It was only with the Governor's approval that the case was dismissed, thus lending further support to the district court's holding that the Governor sets the State's policy in the litigation.

attorney-client role and relationship and has no support whatsoever under Louisiana law.

Similarly, the Louisiana constitution refutes the Attorney General's claim of supremacy over the Governor. Mr. Guste relies heavily and almost exclusively upon the language of Article IV, Section 8 of the Louisiana Constitution of 1974, which designates the Attorney General as the State's "chief legal officer." However, the official records of the constitutional convention that drafted the 1974 state constitution demonstrate that the reference in Section 8 to the Attorney General as "the chief legal officer of the state" is merely an introductory truism and not a technical term indicating substantive or overall supervisory power. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI, at 624-26. *See* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765 (1977). The placement of Section 8, pertaining to the Attorney General, in Article IV of the 1974 Louisiana Constitution, pertaining to the judicial branch, indicates that the Attorney General is an executive officer functioning under the Governor. The Governor, in Article IV, Section 5(A), is designated "the *chief* executive officer of the state." La. Const. 1974 art. IV, sec. 5(A) (emphasis added) (Appendix at 59a).

Thus, any argument of purported supremacy which rests on the State constitution's designation of the Attorney General as the "chief legal officer of the state" must also deal with the incontrovertible fact that the same document designates the Governor "the chief executive officer of the state" with authority over all other executive officers, including the Attorney General. Recognizing this distinction, the district court correctly held that the state constitution "confers no substantive or overall supervisory power" on the office of the attorney general. *See United States v. Louisiana*, 751 F. Supp. at 619.

Mr. Guste has also acted contrary to the provisions of the Louisiana constitution in his efforts to supersede Respondents as attorneys for the State. To supersede an attorney for the State, as Mr. Guste attempted to do before the district court as well as this Court, the Attorney General must establish "cause." La. Const. art. IV, sec. 8 (Appendix at 59a). "Cause" means that the attorney "is not fulfilling his duties satisfactorily." Hargrave at 835.

The drafters of Louisiana's current constitution discussed the meaning of "cause" rather extensively. The records of the constitutional convention are replete with references to the need for some kind of misconduct or failure to act in order to justify the supersession. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI at 902-14. *See* Hargrave at 835-36. Mr. Guste's recently fabricated basis for seeking to supersede the Governor's counsel rests upon his objection to the legal positions taken by these attorneys on behalf of the Governor as to the proper court-ordered remedy. This is a matter of policy, not legal competency.

Mr. Guste alleges that Respondents engaged in a conflict of interest by participating in the remedial phase of the Title VI case. Petition at 18-19. In his Petition, the Attorney General suggests that because it was the State's position that no liability existed, the Governor's counsel were in conflict with the client, the State, by proposing a remedial plan. *Id.* at 19-20.[27]

In fact, the actions by the Governor's counsel in proposing a remedy in the Title VI case were pursuant to court order and in the best interests of the State. In stark contrast, the Attorney General's efforts to change the position of the State at the last minute, attempts to refute the remedy widely accepted by the majority of the defendants in the case as well as the court-appointed Special Master, without even offering a workable substitute, and general engagement in conduct that can most charitably be described as bizarre, can hardly be seen as acting in the State's best interest. Taken to its logical conclusion, the Attorney General's suggested course of action would place the Governor and his attorneys in contempt of court for failure to comply with court orders and procedures during the remedy phase. Mr. Guste has sought to have his choices predominate over those of the Governor and, as discussed, such a position lacks foundation in either the Louisiana case law or the Louisiana constitution.

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[27] The Attorney General suggests that Respondents have violated ethical standards by continuing the representation of the State and, in this regard, makes totally unfounded allegations against Mr. Kennedy. *See* Petition at 8, n.6. These wholly unsupported allegations, typical of the type of argument made by the Attorney General throughout the litigation, obviously have no place in this proceeding.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Mandamus should be denied.

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Of The State Of Louisiana, John N. Kennedy,
Joseph J. Levin, Jr. and Carla Calobrisi

Date: May 31, 1991

No. 90-1647

IN THE

Supreme Court Of The United States

October Term, 1990

IN RE: STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND
WILLIAM J. GUSTE, JR., IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,
Petitioner

APPENDIX TO BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3864

STATE OF LOUISIANA EX. REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
PLAINTIFF-APPELLANT,

v.

CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, *et al.*,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court
for the Eastern District of Louisiana

MOTION TO EXPEDITE APPEAL AND TO CERTIFY QUESTIONS TO THE LOUISIANA SUPREME COURT

NOW COMES the State of Louisiana, *et al.*, William J. Guste, Jr., Attorney General, pursuant to Fifth Circuit Loc. R. 27.2.11 and pursuant to Louisiana Supreme Court Rule XII, Sections 1 and 2, and moves this Court for an expedited appeal and for certification to the Louisiana Supreme Court of the State Attorney representation questions presented herein, *viz.*:

1. Who is the State's legal representative in court – the Attorney General or the Governor?

2. Whether the State of Louisiana has an inherent sovereign right and interest in the legal subsistence and efficacy of its Constitution and to a full and good faith legal defense of those provisions of the Louisiana Constitution of 1974 declared invalid by the federal district court in *USA v. Louisiana*?

3. Whether it is unconstitutional under Louisiana Constitution of 1974, Art. IV, Sec. 8, for Governor ROEMER or special counsel KENNEDY, LEVIN, or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in litigation in either State or Federal court?

4. Whether Governor Roemer's counsel KENNEDY, LEVIN, and CALOBRISI's advocacy, purportedly on behalf of the State, of the imminent nullification of the State's own constitutional and statutory provisions was a professional conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct?

5. Whether KENNEDY, LEVIN, or CALOBRISI's purported representation of the State of Louisiana in *USA v. Louisiana* was *ultra vires* and unconstitutional from the date of their termination as attorneys for the State by Attorney General Guste on August 11, 1989, until the present day.

As good grounds therefor, Attorney General Guste shows:

A. On April 15, 1991 the United States Supreme Court granted certiorari in the *Mississippi Higher Education Desegregation Case, Ayers v. Mabus*, No. 90-6588 (consolidated with *United States v. Mabus*, No. 90-1205). The cloud cast over Attorney General Guste's authority to defend Louisiana's higher education system in federal court by the district court's published "Opinion and Order on the Representation of the State," 751 F. Supp. 609 (Oct. 30, 1990), which is the subject matter of this appeal, must be removed immediately. Otherwise Louisiana will continue to speak with two conflicting legal voices in violation of the Attorney General's exclusive constitutional prerogative as "chief legal officer" under Louisiana Constitution of 1974, Art. IV, Sec. 8, to represent the State as Sovereign in all judicial proceedings in which the State of Louisiana has an interest. Time is plainly of the essence here, since certiorari before judgment on the merits in No. 90-3874 is a litigation strategy that the State of Louisiana, *ex rel. Guste*, may wish to invoke under 28 U.S.C. §2101(e) and Rule 11 of the Rules of the Supreme Court of the United States.

B. We have fully briefed the attorney representation questions presented in No. 90-3464 and rely here on the authorities set forth in our Original Brief on the Merits. We think that Attorney General Guste's authority, denied by the district court below, "Simply is not an extremely close question." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976). But if we are wrong and doubt lingers in the mind of this Court, we respectfully request that the Fifth Circuit immediately certify to the Louisiana Supreme Court

pursuant to its Rule XII the vital, internal state law questions presented.

Only the Louisiana Supreme Court can definitively interpret and apply the State Constitutional and statutory provisions involved herein. Certification is especially appropriate here, given "the respective competence of the State and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959) (per Frankfurter, J.). *Accord*, *Massachusetts v. Feeney*, 429 U.S. 66, 67 (certifying to the Massachusetts Supreme Judicial Court the question whether the Attorney General may prosecute an appeal over the objections of the Governor). In the words of this Circuit's chief advocate of certification, Chief Judge John R. Brown:

> "In our vaunted federal-state structure, the states are supreme (short of constitutional factors) in their own field. The interests of the state are advanced by giving the state an opportunity authoritatively to declare its own law, in light of important underlying state policies. Friction between two sovereign judicial systems and the spectacle of diverse decisions (which all know will spawn unfortunate consequences even though by accident) is thereby avoided through certification."

Brown, *Certification – Federalism in Action*, 7 Cumberland L. Rev. 455, 465 (1977).

WHEREFORE, the State of Louisiana *ex rel.* Guste, Attorney General, respectfully prays that the appeal in No. 90-3864 be expedited, with accelerated briefing and hearing, and that the above-enumerated State Attorney representation questions be certified by this Court to the Louisiana Supreme Court as soon as possible.

Respectfully submitted,

/s/
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
LSBA Bar Roll No. 2248

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CERTIFICATE OF SERVICE

I, William J. Guste, Jr., Attorney General of the State of Louisiana and appellant in this cause, hereby certify that, on the 24th Day of April, 1991, I served copies of the foregoing Motion to Expedite Appeal and to Certify Questions to the Louisiana Supreme Court to all opposing parties, by mailing a copy of same by United States mail, postage prepaid, addressed to the following:

Mr. John N. Kennedy
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Ms. Carla Calobrisi
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2000 M Street, N.W.
Washington, D.C. 20036-3307

Baton Rouge, Louisiana, this 24th day of April, 1991.

/s/
WILLIAM J. GUSTE, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3864

STATE OF LOUISIANA, Ex. Rel.,
WILLIAM J. GUSTE, JR., Attorney General,
and WILLIAM J. GUSTE, JR., in his official
capacity as Attorney General for the State of Louisiana,
Plaintiffs-Appellants,

versus

BUDDY ROEMER, Charles E. "Buddy" Roemer, III,
Governor, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion to expedite the above captioned appeal is GRANTED.

IT IS FURTHER ORDERED that appellants' motion to certify questions to the Louisiana Supreme Court is CARRIED WITH THE CASE.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State of Louisiana to protect the Constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education - the Board of Regents, the Board of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of supervisors, in effect as special attorneys general to represent the interests of the respective boards and of the State of Louisiana, and hereby designates one said counsel, that of the Southern University Board of Supervisors, to represent the particular interests of the Attorney General in defending the constitutionality of the state's constitutional provision declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion

in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

William J. Guste, Jr.
ATTORNEY GENERAL
STATE OF LOUISIANA
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 2nd day of August, 1989.

Attorney of Record

SU wrote Guste's motion
School's lawyer wanted to represent state in case

by John Hill
Gannett News Service
Shreveport Times
9/2/89

BATON ROUGE-Southern University's lawyer wrote the original motion in which Attorney General William Guste last month asked federal district court judges in New Orleans to halt implementation of their college desegregation order, Guste acknowledged Friday.

In that motion, Guste attempted to name Southern's lawyer, state Sen. William Jefferson, D-New Orleans, as the state's – as well as Southern's – attorney in the appeal.

The motion was withdrawn within hours after one of the federal judges in the case phoned Guste to inform him that Jefferson had a professional conflict in the case.

Guste said he quickly rewrote and refiled the motion, this time designating Assistant Attorney General Winston Riddick as the state's lawyer in the case.

The conflict was that Southern had argued Louisiana operated an unconstitutional dual system of higher education, while the state's legal argument was that it did not. U.S. Judge Charles Schwartz phoned Guste to say Jefferson could not represent both sides of that issue, Guste said Friday.

Until Guste filed his motion, John Kennedy, a legal advisor to Gov. Buddy Roemer, had been the lead lawyer for the state in the complicated higher education desegregation case.

Since the Guste motion was filed Aug. 2, there has been a major argument between Guste and Roemer as to who represents the state in the case. That argument has now spilled over into the U.S. Supreme Court, where Kennedy and Guste are battling to be designated the official state attorney.

Gov. Buddy Roemer, contacted Friday, said he had long suspected Guste was acting at Jefferson's behest in the case. He said

he first noticed that the same postage meter was used to mail copies of Guste's motion and documents that came from Jefferson's New Orleans law office.

Roemer said Guste has never satisfactorily explained why he was trying to take over the case after allowing Kennedy and the governor's office to represent the state for so many months.

Jefferson, a New Orleans Democrat who is a graduate of Harvard Law School, said he wrote the motion for Guste's signature and review because the motion on behalf of the state had to be filed quickly on Aug. 2.

Guste acknowledged the original motion designated Jefferson as the lawyer representing the state in the appeal. But after Judge Schwartz phoned to inform him Jefferson had a conflict. Guste retracted the motion and filed a new one designating Assistant Attorney General Winston Riddick and others as the state's attorney.

"It was a mistake, and I acknowledge that it put Jefferson in a position of conflict. I then withdrew the initial motion and rewrote it," Guste said Friday. "Jefferson did not participate in the state's brief that was later filed."

Roemer, who has publicly and privately questioned why Guste entered the case after permitting Kennedy to be the lead lawyer for so many months, reiterated his dismay Friday when told Jefferson and Guste acknowledged their cooperation on the motion.

"I'm still not clear as to any reason why that happened," Roemer said. "It is mighty strange. I am at a loss. I have been for three weeks . . . This has not be [sic] good for our state, for higher education."

Until the federal judges issued their desegregation order in mid-July, Southern had sided with the U.S. Justice Department in the 15-year-old desegregation lawsuit against the state.

Southern had argued for more money to be spent at the state's historically black institutions.

But the court ignored that plea for money and instead ordered the various higher education boards — including Southern's board of supervisors — abolished and replaced by a single governing board. The court also ordered the Southern and LSU law schools merged.

Guste said he did not act any earlier than Aug. 2 because he felt certain someone else would appeal the court order on behalf of the state.

Jefferson said on July 31, he filed Southern's request for a new trial and an appeal to alter or amend the court order. On Aug. 1, Jefferson filed a motion asking for a delay in the implementation of the court's judgment, pending a hearing on the July 31 motions.

Lawyers for Grambling State University, the state's other predominantly black institution, filed similar motions.

On Aug. 1, the federal judges filed a notice that it questioned Grambling's and Southern's legal standing to appeal the case on behalf of the state, since no one from the attorney general's office appealed.

Jefferson said when he learned of the court's action on Aug. 2, he phoned Guste to discuss the matter with him. The attorney general had until midnight to file a motion of appeal.

Guste "couldn't believe the court was questioning Southern's legal standing," Jefferson said. "He called me back and asked when the last day for him to file was. It was that day. It had to be filed by midnight. At that point, his decision was to join in the motions filed by Southern since we had our motions already filed there. That should solve the standing issue."

Jefferson said he delivered the motion to Guste's New Orleans home. Guste signed it, and Jefferson filed that night.

In the original motion, Guste designated Jefferson as the lawyer for both Southern and the state, to argue the issue of whether the court order was constitutional.

Guste said Judge Schwartz then permitted him to refile the motion – which had not yet made it into the court record. In the second draft, Guste designed Riddick as the state's attorney.

Within 15 days, Southern reversed its 15-year legal position and argued that the state was not operating a dual system of higher education.

Roemer questioned why Guste so suddenly entered the case, when he had permitted Kennedy and Roemer to direct the desegregation case for months.

"He and I had met plenty of times; he had never raised the issue," Roemer said.

Jefferson was convenient for college case, Guste says

By The Associated Press

Convenience was the only reason state Attorney General William Guste asked Southern University's attorney to write a federal court motion to halt a disputed college desegregation order, Guste said Saturday.

Guste said he filed the motion on the last day to appeal the order, and state Sen. William Jefferson's office was closer to the federal courthouse where the papers had to be filed.

"As a convenience, he typed up a motion. That's as simple as it is," Guste said.

In the motion, Guste attempted to name Southern's attorney, Jefferson, D-New Orleans, as the state's lead attorney in the appeal. The motion was withdrawn within hours after one of three federal judges handling the case told Guste it posed a conflict of interest for Jefferson.

"It was a mistake and I acknowledge that it put Jefferson in a position of conflict," Guste said. "I then withdrew the initial motion and rewrote it. Jefferson did not participate in the state's brief that was later filed."

Until Guste filed his motion, there was no dispute that John Kennedy, a legal advisor to Gov. Roemer, was the state's lead attorney in the desegregation case.

Roemer supports the desegregation plan ordered by the federal judges.

Guste has said he opposes the plan as an infringement on the state's constitution.

Roemer and Guste each is seeking to have his attorney named the state's official attorney in the case by the U.S. Supreme Court, which will decide in October whether to hear a full appeal.

Guste said Jefferson's conflict of interest arose because Southern had once argued that Louisiana operated an unconstitutional dual system of higher education for whites and blacks, while the state argued it did not.

Southern dropped that longstanding argument after a three-judge panel ordered that one governing board for state colleges and universities should replace the Southern Board of Supervisors and other boards governing higher education. The judges also refused to specify how much the state must spend to improve traditionally black schools.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

MOTION TO WITHDRAW "NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT" AND MOTION TO ENROLL COUNSEL OF RECORD

I

On August 2, 1989, undersigned counsel filed a pleading entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment."

II

The Attorney General of the State of Louisiana now desires to withdraw that pleading and to substitute in its place a new pleading as evidenced by Attachment "A" which is attached hereto.

III

The Attorney General of the State of Louisiana further moves the court to enroll Mr. Kenneth C. DeJean, First Assistant Attorney General (#4816), Mr. Winston W. Riddick, Executive Assistant Attorney General (#11,263) and Mr. David Sanders, Assistant Attorney General (#11,696) as counsel of record for the State of Louisiana.

Respectfully submitted,

/s/

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 3 day of August, 1989.

/s/

Attorney of Record

ATTACHMENT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State Of Louisiana to protect the constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education - the Board of Regents, the Board of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of supervisors, in effect as special assistant attorneys general to represent the interests of the respective boards and of the State of Louisiana. The Attorney General of Louisiana hereby designates Kenneth C. DeJean, First Assistant Attorney General (#4816), Winston W. Riddick, Executive Assistant Attorney General (#11,263), and David Sanders, Assistant Attorney General (#11,696), to represent the particular

interests of the Louisiana Attorney General and the State of Louisiana in defending the constitutionality of the state's constitutional provisions declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

/s/

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this ____ day of August, 1989.

Attorney of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 89-3637 & 90-3379

USDC #CA 80-3300 A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

versus

STATE OF LOUISIANA, ET AL.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant, the State of Louisiana (*ex rel.* William J. Guste, Jr., Attorney General of the State of Louisiana), to consolidate the captioned appeals, and the motion of appellants, the State of Louisiana (State), acting through its Governor, Charles E. "Buddy" Roemer, III, the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Trustees for Louisiana State Colleges and Universities, to consolidate the captioned appeals, are GRANTED; further that the alternative motions of said parties for leave to intervene in appeal No. 90-3379 are DENIED as moot.

IT IS FURTHER ORDERED that the motion of appellants, Grambling State University Alumni Association (GSUAA), for leave to intervene in appeal No. 90-3379 is DENIED as moot in view of the remand hereinbelow ordered (said denial being without prejudice to GSUAA's seeking to intervene in the district court).

IT IS FURTHER ORDERED that the motions to remand filed by the State of Louisiana, acting through its Governor, Charles E. "Buddy" Roemer, III, and by the United States of America, are GRANTED, and the cause is remanded to the district court so that it, in the first instance, may make the desired scheduling or implementation dates or related adjustments to its challenged orders and consider the pending matters concerning representation of the State, as well as act on matters ancillary or related to any of the foregoing, including any request for stay.

So that the intent of our orders in this respect may be better understood, we set forth the following background.

Our cause No. 89-3637 is the consolidation of various appeals to this Court challenging the three-judge district court orders, in its cause No. 80-3300, dated August 2, 1988, *see United States v. State of Louisiana*, 692 F.Supp. 642 (E.D. La. 1988), July 19, 1989, *see United States v. State of Louisiana*, 718 F.Supp. 499 (E.D. La. 1989), and August 4, 1989, *see United States v. State of Louisiana*, 718 F.Supp. 521 (E.D. La. 1989), and *United States v. State of Louisiana*, 718 F.Supp. 525 (E.D. La. 1989).[1] The appellants in our cause No. 89-3637 likewise directly appealed the district court's said orders to the United States Supreme Court. The Supreme Court on August 18, 1989 (Brennan, Marshall, and Blackmun, JJ., dissenting) stayed the enforcement of the district court's said judgment and orders "pending the timely docketing of appeals in this case and final disposition by the Court." *Southern University Board of Supervisors v. United States*, 110 S.Ct. 17 (1989); *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, 110 S.Ct. 18 (1989) (these stay orders extended the temporary stay entered by Justice White on August 14, 1989). On January 8, 1990, the Supreme Court entered orders, without opinion, that the direct appeals to it from the district court "are dismissed for want of jurisdiction." *Louisiana ex rel William J. Guste, Attorney General of Louisiana v. United States*, 110 S.Ct. 708 (1990); *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, 110 S.Ct. 708

[1] For the earlier history of this case, *see United States v. State of Louisiana*, 543 F.2d 1125 (5th Cir. 1976); *United States v. State of Louisiana*, 90 F.R.D. 358 (E.D. La. 1981), aff'd, *United States v. State of Louisiana*, 669 F.2d 314 (5th Cir. 1982); *United States v. State of Louisiana*, 527 F.Supp. (E.D. La. 1981).

(1990); *Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States*, 110 S.Ct. 708 (1990). It is assumed by all parties involved, and correctly so, we believe, that the referenced dismissals for want of jurisdiction were predicated on the Supreme Court's implicit conclusion, in accordance with the motion to dismiss previously filed in the Supreme Court by the United States, that the case in the district court was not properly a three-judge district court case, see 28 U.S.C. § 2284 and former § 2281, and that accordingly the Supreme Court did not have jurisdiction of the attempted direct appeals to it from the three-judge district court. 28 U.S.C. § 1253.

After the direct appeals to the Supreme Court were lodged, and after the "protective" appeals to this Court were lodged, we stayed the appeals in this Court pending resolution of the direct appeals to the Supreme Court. It appears that the stay of the proceedings in our Court, as well as the Supreme Court's August 18, 1989 stay of the district court's judgment and orders, have terminated by their terms by virtue of the Supreme Court's January 8, 1990 dismissals of the direct appeals to it for want of jurisdiction. We subsequently denied a motion for initial en banc consideration of this case by our Court; but a briefing schedule in this Court has not been fixed.

On April 30, 1990, the three-judge district court held a status conference with the parties to this case (apparently some of the parties objected to its jurisdiction to do so), and following the status conference, the three-judge district court on May 3, 1990 issued its written "order and reasons." While this document expresses a number of opinions or legal conclusions,[2] the only actual order or decree contained therein appears in the following language thereof: "The three-judge panel is hereby dissolved, and hereinafter the case, when before the District Court, shall be presided over by Judge Schwartz [Chief Judge, United States District Court for the Eastern District of

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[2] Including the view that the Supreme Court had implicitly ruled that the case was not one for a three-judge district court, that earlier orders of the three-judge district court remained in effect, that the district court had jurisdiction to enter further injunctive orders, and that "no stay is in effect."

Louisiana, a member of the three-judge district court panel in question] alone."[3]

On May 4, 1990, the Governor of Louisiana, purporting to represent the State of Louisiana, filed with us (in our cause No. 89-3637) a motion to remand the case to the district court, reciting, *inter alia*, as follows:

> "On April 30, 1990, the three-judge district court in the above-captioned case held a status conference in which all parties participated. At the conference, the court expressed a desire to have this case remanded for the entry of an order more appropriate to the changed circumstances of the case and to consider the question of who is the appropriate party to represent the State of Louisiana in the litigation. More specifically, the trial court expressed the concern that after the trial court entered its Order and Reasons establishing the requirements for remedy in the above-captioned case and the dates by which certain aspects of the remedy were to be effected, the passage of time and intervening events rendered unfeasible the schedule directed by the court."[4]

On May 11, 1990, the United States filed with us (in our cause No. 89-3637) its "Motion of the United States for Remand of Case to the District Court," in which the United States, through Assistant Attorney General John R. Dunne, represents, *inter alia*, as follows:

> "On April 30, 1990, the three-judge district court held a status conference with the parties to this case. At the

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[3] Our cause No. 90-3379 is the purported appeal, by notice of appeal filed below on May 21, 1990, by the Board of Supervisors of Southern University from the May 3, 1990 "order and reasons." In light of our consolidation of our cause No. 90-3379 with our cause No. 89-3637 (itself an earlier consolidation of several appeals taken in 1989) and our remand of the case, as thus consolidated, we need not (and do not) hereby determine whether (or if so, in what respects) the May 3, 1990 "order and reasons" constitutes an appealable order.

[4] This motion continues by stating:

> "Additionally, the question of who represents the State in this litigation, the Governor or the Attorney General of the State of Louisiana, is a threshold issue which should be addressed in the first instance by the trial court."

> conference, the district court requested that the United States ask this Court to remand the case, so that the district court may take action on two issues relating to this case. [Footnote omitted.] The first issue involves the timing of the relief ordered in this case. Because the Supreme Court stayed implementation of relief while it considered the jurisdictional statements, the dates for implementation of the remedial plan are not possible to meet, and the district court is of the view that a remand is necessary to permit it to amend the orders by adjusting the dates for implementation of the remedial plan."[5]

The Attorney General of Louisiana, purporting to represent the State of Louisiana, and the Board of Supervisors of Southern University and Agricultural and Mechanical College, have filed oppositions to the said motions to remand. Although we do not have a transcript (or other written memorialization) of the proceedings at the April 30, 1990 status conference, and apparently none exists, none of the oppositions to the motions to remand question the factual accuracy of the herein above-quoted statements made in the motions for remand, and we accordingly accept as true, for purposes of this order, the factual accuracy of the said quoted statements.

We note that the district court's August 2, 1988, July 19, 1989, and August 4, 1989 orders direct extensive, broad, and sweeping changes in and reconstitution of Louisiana higher education and its structure and system of governance and administration; moreover, it is likewise evident that the schedule directed by said orders for such changes and reconstitution can no longer be met and that the passage

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[5] The United States' motion continues by stating:

> "In addition, the court also has before it a dispute about which lawyers – those from the Governor's office or those from the state Attorney General's office – should represent the state of Louisiana in this case. The Attorney General of Louisiana, in August of 1989, filed with the district court a motion to replace counsel from the Governor's office, who were designated to represent the state of Louisiana in this case, with counsel from the state Attorney General's office. Counsel from the Governor's office have disputed the Attorney General's authority to remove them from the case. The district court indicated at the status conference that it will address that issue once the case is remanded."

of time and intervening events have rendered that schedule unfeasible. The district court has asked that the case be remanded to it "for the entry of an order more appropriate to the changed circumstances of the case."

We also note that the question of whether implementation of the district court's orders should be stayed – in whole or in part – pending our resolution of the appeals in this cause is almost certainly bound to arise, and that a proper resolution of that issue may be influenced by what the various dates set for compliance are and, further, that such a stay matter should normally be addressed by the district court in the first instance. We realize that on August 4, 1989 the three-judge district court denied a stay. *See United States v. State of Louisiana*, 718 F.Supp. 521, 523-25 (E.D. La. 1989). However, conditions have changed since then, and new timetables may be appropriate, as noted. Further, after the district court denied a stay, the United States Supreme Court granted a stay. It is fair to say that such action – particularly over three dissenting votes – implies that the United States Supreme Court concluded that the parties attacking the district court's said 1988 and 1989 orders had made a strong showing that they were likely to succeed on the merits of their appeals, that they would be irreparably injured without a stay, and that balancing the equities between the parties and considerations of the public interest favored a stay. *See, e.g., Karcher v. Daggett*, 102 S.Ct. 1298 (1982) (Brennan, J., in chambers). When a stay is again applied for, it is appropriate to consider the Supreme Court's earlier action in granting a stay. *See Volkswagenwerk v. Falzon*, 103 S.Ct. 1810 (1983) (O'Connor, J., in chambers).[6]

We also note that potential questions posed by the implied holding of the Supreme Court that a three-judge district court was inappropriate may be alleviated or obviated by a remand.[7]

[6] Our remand authorizes the district court to consider, in the first instance, any application for a stay.

[7] As the May 3, 1990 "order and reason" observes, although it is clear that an erroneously convened three-judge district court has jurisdiction to dissolve itself and remit the case to the single judge to whom it was originally assigned, *see Young v. Walker*, 435 F.Supp. 1089, 1094-95 (M.D. Fla. 1977), whether the orders of an improper three-judge district court remain valid is a matter on which there is little authority which is clearly on point as so holding, although there are indications that such orders are not invalid. *See Swift & Co. v. Wickham*, 230 F.Supp. 398, 410 & n. 10 (S.D. N.Y. 1964).

Under all the circumstances, we believe that the better course is to grant the motions to remand the case to the district court. *Cf. Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976); *Ferrell v. Trailmobile*, 223 F.2d 697, 699 (5th Cir. 1955); *Alvestad v. Monsanto Co.*, 671 F.2d 908, 911 n. 2 (5th Cir. 1982). While these cases are not on "all fours," and the distinctions between them and this case might be important in another context, we nevertheless conclude that under these circumstances granting the motions to remand is appropriate.[8]

[8] Our action is not to be taken as ruling on who rightfully represents the State of Louisiana, or on the correctness or incorrectness of the conclusions or opinions expressed in the May 3, 1990 "order and reasons," or on the ultimate merits of the district court's August 1988 and July and August 1989 orders.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

STATE OF LOUISIANA

CIVIL ACTION
NO. 90-3300
SECTION "A"

ORDER

This matter is before the Court upon remand by the Fifth Circuit Court of Appeals, as per its Order filed August 29, 1990. Also pending before the Court are motions by the State of Louisiana, ex rel. William J. Guste, Jr., and the Board of Supervisors of Southern University and A&M College, to schedule a status conference.

This Court does not interpret the Fifth Circuit's remand as a mandate to re-open this costly and protracted litigation. Rather, this Court is now called upon to make certain limited determinations, in furtherance of an expeditious resolution of this case and in order to place this matter in an appropriate posture for the additional appeals that will most surely ensue. The Court accordingly enters the following orders:

(1) As an initial matter, this Court is mindful of the Fifth Circuit's observation that "potential questions posed by the implied holding of the Supreme Court that a three judge district court was inappropriate may be alleviated or obviated by a remand." In order to resolve any lingering doubts as to the full force and effect of all orders previously issued during the course of this matter's proceeding before the Three Judge Panel, the Judge of Section "A" would observe that as a member of such Panel, this Judge was always in full agreement with the Orders and determinations of the Panel and that all orders entered herein, with the possible exception of some purely housekeeping measures ordered by the Judge of Section "A" as the writing Judge, were entered after discussion among the members of the panel, with approval of all

members of the Panel. All Orders previously entered were unanimous, and this Judge is still in full agreement with such Orders. Accordingly, IT IS ORDERED that all Minute Entries, Orders and Opinions previously entered herein are HEREBY ADOPTED by the Judge of Section "A" in full *nunc pro tunc* and shall be deemed in full force and effect as if entered by this Judge sitting alone.

(2) An additional procedural matter to be resolved upon remand inheres in the motion by Attorney General Guste for a resolution of the issue of who represents the State of Louisiana in the instant proceedings.

Accordingly, IT IS ORDERED that on or before Tuesday, October 9, 1990, Attorney General Guste and the Governor's office shall each submit a memorandum addressing this issue. Any other concerned party may also file a memorandum addressing this issue but such parties are not required to do so.

The memoranda shall include citation of legal authorities on this point and shall address, as a factual matter, the extent of the Attorney General's participation in this matter prior to July 1989, including dates of Court appearances, appearances at status conferences and memoranda filed by the Attorney General. Similar information shall also be provided with respect to Mr. Kennedy's Court appearances and memoranda filed. The parties shall also address: (a) the right of the Governor to appear and participate as amicus herein, notwithstanding the Attorney General's right *vel non* to appear herein on behalf of the State; and (b) whether the Attorney General acquiesced in the Governor's representation of the State herein by his failure to object prior to July 1989 and/or by his failure to take a more active role in the handling of this matter on behalf of the State prior to July 1989.

(3) IT IS FURTHER ORDERED that on or before October 11, 1990, all parties shall also submit in writing any objections to this Court's proposed revisions to the Opinion and Order of July 19, 1989, as supplemented by Order by August 4, 1989, which proposed revisions are attached hereto as Exhibit A.

The parties shall submit three copies of all memoranda and objections filed pursuant to this Minute Entry, in addition to the original of such pleadings.

In light of this Court's interpretation of its instructions upon remand and the matters ordered above, the motions to schedule a status conference are HEREBY DENIED, reserving to the Court the right to schedule any hearing it may deem necessary following review of the memoranda and objections filed in compliance with this Minute Entry.

New Orleans, Louisiana, this 21st day of September, 1990.

/s/_____
UNITED STATES DISTRICT
JUDGE

MINUTE ENTRY
OCTOBER 4, 1990
SCHWARTZ, J.

UNITED STATES OF AMERICA
VERSUS
STATE OF LOUISIANA

CIVIL ACTION
NO. 80-3300
SECTION "A"

This matter is before the Court on the motion of the State of Louisiana ex rel. Guste to schedule a status conference and upset the current schedule for filing memoranda set forth in the Court's Order of September 21, 1990 in light of the *en banc* decision by the United States Court of Appeal for the Fifth Circuit in *Ayers v. Allain*. IT IS ORDERED that the State of Louisiana's motion for status conference is DENIED.

IT IS FURTHER ORDERED that the schedule for filing memoranda set forth in this Court's Order of September 21, 1990 will not be upset, and the parties are to comply with the dates set forth in that Order.

IT IS FURTHER ORDERED that any party wishing to file a reply memorandum shall do so by October 26, 1990.

IT IS FURTHER ORDERED that any party wishing to respond to the State of Louisiana ex rel. Guste's October 3, 1990 motion shall do so by October 26, 1990.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA *et al.*,

Defendants.

Civil Action No. 80-3300
Section "A"

STATE OF LOUISIANA
EX REL. WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CHARLES E. "BUDDY" ROEMER, III,
GOVERNOR, JOHN N. KENNEDY,
JOSEPH LEVIN, JR. AND
CARLA CALOBRISI,

Defendants.

Civil Action No.____

MOTION TO TRANSFER AND CONSOLIDATE

Pursuant to Rule 1.051E of the Local Rules for the United States District Court for the Eastern District of Louisiana, Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully move to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" of the Eastern District of Louisiana. Further, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, Defendants move to consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*, presently pending

in the Eastern District of Louisiana before the Honorable Charles Schwartz, Jr. Defendants submit this motion simultaneously with the filing of Defendants' Notice of Removal of Action, a copy of which is attached hereto. Defendants submit the attached Memorandum of Points and Authorities in support of this motion.

Respectfully submitted,

/s/

Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

John Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
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Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/

Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA *et al.*,

Defendants.

Civil Action No. 80-3300
Section "A"

STATE OF LOUISIANA
EX REL. WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CHARLES E. "BUDDY" ROEMER, III,
GOVERNOR, JOHN N. KENNEDY,
JOSEPH LEVIN, JR. AND
CARLA CALOBRISI,

Defendants.

Civil Action No.____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER AND CONSOLIDATE

Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully request this Court to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" of the Eastern District of Louisiana. Defendants request further that this

Court consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*, presently pending in the Eastern District of Louisiana before the Honorable Charles Schwartz, Jr.

Civil Action Number 80-3300, *United States v. Louisiana*, has been pending in this and other federal courts since 1974. One of the primary issues currently being litigated is the matter of who is the proper representative of the State of Louisiana, the Attorney General or the Governor, in federal court litigation to which the State is a party. The action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, was commenced on or about October 9, 1990, in the Louisiana Civil District Court for Orleans Parish. Defendants filed a Notice to Remove Case, pursuant to 28 U.S.C. Section 1441, on October 12, 1990. The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief is whether the Governor or the Attorney General is the proper representative of the State of Louisiana in federal court litigation to which the State is a party, the same question of law and fact pending before this Court in Civil Action Number 80-3300, *United States v. Louisiana*.

Rule 1.051E of the Local Rules for the United States District Court for the Eastern District of Louisiana provides that:

> In order to promote judicial economy and conserve judicial resources . . . all [collateral] actions . . . shall be transferred to the section to which the matter having the lowest docket number has been allotted . . . .

Thus, it is appropriate for this Court to transfer *State of Louisiana ex rel. Guste v. Roemer, et al.*, to Section "A".

Further, Rule 42(a) of the Federal Rules of Civil Procedure provides that:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing . . . of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such

orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A common question, both of law and fact, exists in the two above entitled actions. This Court has broad discretion to order consolidation if, under the circumstances, such consolidation will foster clarity, efficiency and the avoidance of confusion. *Miller v. United States Postal Service*, 729 F.2d 1033, 1036 (5th Cir. 1984). *See In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977). The two actions involve a common question of both law and fact – the determination of the proper representative of the State of Louisiana in federal court litigation to which the State is a party. Under the circumstances, consolidation of the actions will promote clarity and efficiency while preventing any confusion or delay.

For the foregoing reasons, Defendants respectfully move this Court to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" and to consolidate the action with Civil Action Number 80-3300, *United States v. Louisiana*.

Respectfully submitted,

/s/

Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

John Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/

Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 1990, a copy of the foregoing NOTICE OF HEARING; MOTION TO TRANSFER AND CONSOLIDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER AND CONSOLIDATE; AND PROPOSED ORDER was sent by U.S. Mail, first class, postage prepaid, to the following:

Mark L. Gross, Esq.
Appellate Section
Civil Rights Division
United States Department of Justice
Post Office Box 66078
10th and Pennsylvania Avenue, N.W.
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/s/
John N. Kennedy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES

VERSUS

STATE OF LOUISIANA

CIVIL ACTION
NO. 80-3300
SECTION "A"

MOTION TO DESIGNATE COUNSEL FOR THE STATE AND WITHDRAW DESIGNATION OF ADDITIONAL COUNSEL

Now into Court comes the State of Louisiana through Attorney General William J. Guste, Jr., who moves:

1.

Louisiana Constitution of 1974, Art. IV, Sec. 8, designates the Attorney General as the chief legal officer for the State of Louisiana: "There shall be a Department of Justice, headed by the Attorney General, who shall be the chief legal officer of the state . . . As necessary for the ascertain [sic] or protection of any right or interest of the state, the attorney general shall have the authority (1) to institute, prosecute, or intervene in any civil action or proceeding; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, . . . (b) to supercede any attorney representing the state in any civil . . . action."

2.

In 1988 and 1989, by motion with this Honorable Court and by letter to counsel, the Louisiana Attorney General designated attorneys to represent each of the various defendants in this case. Since each individual defendant board of higher education had specific legal positions and a desire for independent representation it was deemed this would be the most appropriate manner for those agencies to be able to assert their individual interests.

3.

This Honorable Court entered a judgment of liability in August of 1988 and a judgment imposing a remedy in July of 1989.

4.

This Honorable Court denied a motion for a rehearing and a stay filed by the Attorney General of the State of Louisiana and Southern University in August of 1989.

5.

Now this matter is on appeal and a fundamental state policy is at issue. Article XIV, Section 38, of the Louisiana Constitution, provides for the creation of a board of regents for higher education; a board of supervisors for L.S.U.; a board of supervisors for Southern University and a board of trustees for state colleges and universities for all other institutions of higher education. The voters of the State of Louisiana had the option in its vote on the 1974 constitution to determine whether they wanted "Alternative B" which provided for the creation of those four boards listed above or to have only two boards of higher education. The voters made a decision when they adopted the 1974 constitution to have four boards of higher education instead of only one board of higher education.

6.

The decision of this honorable court presents fundamental constitutional issues and challenges which require a unitary legal representation of the state's interest. Article X, Section 30, of the Louisiana Constitution, provides for an oath of office, sworn to by the undersigned which binds the Attorney General to represent the interests of the state and to uphold the constitution and laws of the State of Louisiana.

7.

In order that there not be any question as to the representation of the State of Louisiana and the defendants' state boards and agencies for the State of Louisiana, the undersigned designates the counsel for the State and its various Boards of Higher Education as follows: *Representation of the State of Louisiana: Attorney William J. Guste, Jr., Attorney General; Kenneth C. DeJean, First Assistant Attorney*

General; Winston W. Riddick, Executive Assistant Attorney General; Thomas S. Halligan, Assistant Attorney General; David G. Sanders; Assistant Attorney General; and Winston DeCuir, Special Assistant Attorney General. Representation of the Louisiana State University Board of Supervisors, Taylor, Porter, Brooks and Phillips, W.S. McKenzie, Esq.; Southern University Board of Supervisors, Jefferson, Bryan, Jupiter, Lewis and Blanson, William Jefferson, Esq.; Louisiana State Board of Trustees for Colleges and Universities, Bronfin, Heller, Steinberg and Berins, Robert Kutcher, Esq.; Louisiana Board of Regents, Margaret Woodward, Esq.

8.

While the Governor of Louisiana is not a party to these proceedings, he has designated the following special counsel: John Kennedy, Esq., Joseph J. Levin, Esq., and Carla Calobrizi, Esq., who are entitled to file pleadings and to make appearances herein on behalf of the Governor of Louisiana but not on behalf of the State of Louisiana.

9.

As Attorney General, I wish to further inform the Court that any other designation of additional counsel by me on behalf of the State of Louisiana or any of its defendant boards or agencies for whom I have constitutional responsibility to provide legal representation, is hereby withdrawn and therefore hereby notify the Court that only the attorneys listed above shall be representatives for the State of Louisiana in legal proceedings before this Court and on appeal in this matter.

Now therefore, I respectfully request that this Court issue an order accepting the designation of counsel for the State of Louisiana as provided for herein.

_____

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
APPELLANT

VERSUS

UNITED STATES OF AMERICA,
APPELLEE

MOTION TO SUPERSEDE AND TO WITHDRAW NAMES OF PURPORTED COUNSEL FOR STATE OF LOUISIANA AND TO STRIKE RESPONSE IN OPPOSITION TO STATE'S MOTION FOR STAY ADDRESSED TO INDIVIDUAL JUSTICE

[EXCERPTS ONLY]

TO: The Honorable Byron R. White
Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

Appellant, the State of Louisiana ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, is a defendant in this enforcement action brought by the United States of America seeking to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, §2000d-1, and the Fourteenth Amendment to the Constitution of the United States relative to desegregation of higher education within the State. Appellant, having filed its Notice of Appeal to the Supreme Court of the United States on August 10, 1989, and having filed a Motion for Stay Addressed to Individual Justice in this Honorable Court on August 11, 1989, to which was appended a copy of said Notice of Appeal, moves this Honorable Court to order the supersession by the Attorney General of the State of Louisiana over any other purported counsel for the State of Louisiana, including, without limitation, John N. Kennedy, Special Counsel to the Governor, Office of the Governor, Fourth Floor, State Capitol, P.O. Box

94004, Baton Rouge, Louisiana 70804, and Joseph J. Levin, Jr., and Carla Calobrisi, ADAMS, McCULLOUGH & BEARD, Attorneys at Law, 200 M. Street, N.W., Washington, D.C. 20036-3307, to withdraw their enrollment as additional counsel for the State of Louisiana, to strike their names as counsel for the State of Louisiana, and to strike any and all responses filed by any such counsel purportedly for or on behalf of the State of Louisiana in opposition to the motion for stay filed by appellant.

1. STATEMENT OF APPLICATIONS PREVIOUSLY MADE: On August 11, 1989, appellant filed a motion to designate counsel for the State of Louisiana with the United States District Court for the Eastern District of Louisiana (Three-Judge Panel). That court has not yet acted on said motion and, on information and belief, is researching the question of whether it still has sufficient residual jurisdiction to entertain the motion. In the meantime, however, appellant was only yesterday served with a response in opposition to appellant's motion for a stay, which response was filed by purported counsel for the State of Louisiana. Such action immediately compels a motion and decision in this Honorable Court to resolve the issue of legal representation of the state's fundamental constitutional interests at stake in these proceedings, even though the lower court is still pondering whether it or this Honorable Court has jurisdiction to decide same.

2. BRIEF STATEMENT OF THE CASE: This action was commenced on March 14, 1974, by the U.S. Attorney General on behalf of the United States to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (hereinafter referred to as Title VI). The

* * *

The authority for this Honorable Court to have granted and to continue the stay of the lower court's orders appealed from is contained in Article III of the Constitution of the United States of America, 28 U.S.C. 1651, 28 U.S.C. 201, 28 U.S.C. 2072, Rules 43 and 44 of this Honorable Court, and *Coleman v. Paccar Inc.*, 424 U.S. 1301, 96 S. Ct. 845, 47 L.Ed.2d 67 (1976).

[While appellant's research has indicated that the appeal in this case is directly to this Honorable Court, in the event that this Honorable Court should later decide that the appeal should have been taken to the U.S. Court of Appeals in and for the Fifth Circuit, then appellant intends to ask that this Honorable Court vacate the lower court's orders appealed from in order to allow the lower court to reinstate them and thereby preserve appellant's appeal to the U.S. Court of Appeals. Such was done in *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2n 215 (1968) and *Gonzalez v. Automatic Employees Credit Unit*, 419 US 90, 95 S.Ct. 289, 42 L.Ed.2d. 249 (1974).]

This Honorable Court's power to grant this particular motion is also contained in Article III of the Constitution of the United States of America, 28 U.S.C. §1651, 28 U.S.C. §201, 28 U.S.C. §2072, Rules 42, 43, and 44 of this Honorable Court, and *Coleman v. Paccar Inc.*, 424 U.S. 1301, 96 S. Ct. 845, 47 L.Ed.2d 67 (1976). This motion is ancillary not only to the merits of this appeal but specifically to the motions for and orders granting the stay as well.

If this Honorable Court has any doubts about the Attorney General's power to supersede the Governor's Special Counsel herein, it also has the power to certify this question to the Supreme Court of Louisiana in accordance with *Massachusetts v. Feeny*, 429 U.S. 66, 97 S.Ct. 345, 50 L.Ed.2d 224 (1976) and Rule 12 of the Rules of the Supreme Court of Louisiana.

* * *

Therefore, it is the Attorney General who is empowered to represent the State of Louisiana in this case on appeal, not the Governor. The Governor, as seen from the constitutional provisions quoted above, does not possess this power. Thus, when the Attorney General withdraws his authority for John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi to represent the state herein, they cease to have any right to represent the State of Louisiana in this case. However, because they are continuing to purport to represent the state against the state's own fundamental interests as specifically expressed by the Louisiana Constitution and have continued to make filings to that effect in this Honorable Court, it is necessary and urgent for this Honorable Court to order the supersession by the Attorney General of the State of

Louisiana over the Governor's Special Counsel, to withdraw their enrollment as additional counsel for the State of Louisiana, to strike their names as counsel for the State of Louisiana, and to strike any and all responses filed by any such purported counsel for or on behalf of the State of Louisiana in opposition to the motion for stay filed by appellant. [The Attorney General has no objection to their representation of the Governor himself but does object to their representation of the State of Louisiana. However, it must be pointed out that the Governor is not a party to these proceedings. Prior Governor Edwin W. Edwards was named as a party defendant in the original complaint solely in his capacity as an ex officio member of the then existing boards of education involved. However, the subsequent 1974 Constitution, which became effective January 1, 1975, changed the make-up of the boards of higher education to the present system and did not include the Governor as an ex officio member. Later, the amended complaint deleted the Governor as a party defendant in this case.]

What happened herein is that the Governor's Special Counsel did not seem at first to advocate the invalidity of any state constitutional provisions. To uphold these in litigation is the Attorney Generl's [sic] sworn duty. To uphold these in other situations and circumstances is also the ultimate, sworn duty of the Governor. The Attorney General did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered. For fifteen years of this litigation, the United States of America, the sole complainant, never advanced such a remedy. There is nothing in the Constitution of the United States of America or Title VI of the Civil Rights Act of 1964 which prohibits a state from having four boards of higher education with divided functions, instead of one board with consolidated functions. Indeed, the abolition of four boards created in 1975 does not appear to be an entirely rationalapproach [sic] to removing vestiges of prior *de jure* segregation that existed long ago under one general board and one board for one university. Nor could the Attorney General reasonably anticipate that the Governor's Special Counsel, enrolled as additional counsel for the state by the Attorney General, would abandon the duty to uphold the state's constitution.

* * *

RULE II

GROUNDS FOR DISCIPLINARY ACTION

(A) Any attorney authorized to practice before this court may be disbarred or suspended from further practice before this court or subjected to such other disciplinary action as the court finds the circumstances warrant if such attorney:

(1) Has been convicted in any court of the United States or any of its territories, commonwealths or possessions, the District of Columbia or any State of the United States of a serious crime as same is hereinafter defined, or

(2) Has been convicted of an offense not constituting a "serious crime" or has committed acts or omissions individually, or in concert with any other person or persona, which violate the laws of the United States or any territory, commonwealth or possession thereof, the District of Columbia, or of any State, whether or not said acts or omissions occur in the course of an attorney-client relationship, or the rules of this court or The Rules of Professional Conduct hereinafter adopted by this court, or

(3) Has been disbarred or suspended from the practice of law by any court of the United States, any of its territories, commonwealths or possessions, the District of Columbia or any State of the United States.

(B) The court hereby adopts The Rules of Professional Conduct adopted by the Supreme Court of the State of Louisiana, as amended from time to time by said Supreme Court, except as otherwise provided by specific rule of this court.

(C) The term "serious crime" shall include not only any felony but also any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

Rule 3.3. Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Conceal or knowingly fail to disclose that which he is required by law to reveal; however, if a lawyer discovers that his client has perpetrated a fraud on a tribunal, he shall promptly call on his client to rectify same and, if the client shall refuse to do so or be unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in Paragraph (a)(1) and (3) continue to the end of the hearing or proceeding. The duties stated in Paragraph (a)(2) and (4) are unlimited in time and apply, even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes in false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Amended Jan. 12, 1988.

Rule 4.1. Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration or justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Except upon the expressed assertion of a constitutional privilege, to fail to cooperate with the Committee on Professional Responsibility in its investigation of alleged misconduct.

(h) Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Roemer proposes superboard as college segregation remedy

by Ed Anderson
Capital bureau
8/12/88
Times Picayune

BATON ROUGE – A superboard to govern all of the state's colleges and universities is the keystone of Gov. Roemer's proposal to bring the schools in compliance with federal desegregation laws, the governor's lawyer said Thursday.

A federal court ruled last week that the state's racially divided higher education system violates civil rights laws. The court suggested several remedies, including a superboard to replace the present four-board system.

Roemer said other options he has advanced as remedies include:

•Establishing a system of junior colleges.

•Setting up "magnet schools," allowing universities to specialize in certain areas and avoid overlapping programs. For example, one college might specialize in computer programs and another in education or pharmacy.

•Establishing a flagship university.

The court had suggested junior colleges and reducing four-year schools with duplicative programs.

The court ruling came in a 1974 federal lawsuit against the state, a case in which both sides entered into a consent decree in 1981 to eliminate discrimination. The state has spent $200 million under the decree to improve black schools to attract white students, but the federal court said last week it hasn't worked.

Representatives of the schools, the federal government and the state are negotiating to reach an agreement acceptable to the federal courts before the case goes to trial next month. Roemer's plan was submitted to the negotiators Thursday, Kennedy said.

Roemer pushed a superboard proposal in the Legislature this year, but it died in the Senate. The state now has one board that oversees the predominantly white Louisiana State University System,

another that operates the predominantly black Southern University system, a third that operates other colleges and a fourth board that coordinates the other three.

Roemer to promote consolidating boards

by Carl Redman
Capitol news bureau
8/20/88
Morning Advocate

Gov. Buddy Roemer said Friday he will try to convince a federal court in New Orleans that the best way to desegregate higher education in Louisiana is to create a single management board and give the new board a year to overhaul the system.

The governor said it would be unwise for state leaders to attempt to restructure Louisiana higher education in the five weeks left before the scheduled start of a trial in federal court.

Roemer said he doesn't want to "shoot from the hip" with a desegregation plan.

The best approach is to consolidate the four boards currently in charge of the state's public colleges and universities and then to give the new board time to draft a new master plan for higher education, Roemer said.

Roemer said he is pleased that two boards — the Board of Trustees for State Colleges and Universities and the Board of Regents — have taken positions in apparent support for his proposal to settle a longstanding desegregation case.

Roemer said his plan will be put before a three-judge court in New Orleans during a status conference next week.

Roemer and his advisers have been working in recent months with parties to a 1981 state/federal desegregation agreement in an effort to come up with a desegregation plan that is acceptable to the federal court.

The 1981 decree expired Dec. 31, 1987, and parties to the case — including higher education officials and lawyers with the U.S.

Justice Department — have been trying to negotiate a settlement to avoid a Sept. 22 trial on the case.

Early this month, the court issued an order that said the state is maintaining a dual system of higher education — one system for blacks and another for whites.

In addition, the judges said, although the state spent millions of dollars to enhance black colleges under the aegis of the 1981 decree, black schools have gotten blacker and white schools whiter in the last half-dozen years.

The judges suggested several steps that might help desegregate the higher education system, including development of a junior college system, downgrading some four-year schools and merging higher education management.

Roemer is a strong proponent of a single board to replace the policy-making Board of Regents and the managing boards, the Board of Trustees, the LSU Board of Supervisors and the Southern University Board of Supervisors.

Roemer reiterated Friday his position that merger of the boards should be done as a precursor to any other dramatic changes in higher education.

In addition, Roemer said he will suggest to the court that once higher education management is consolidated, the new board be given a year to hold hearings and decide the future of the state's colleges and universities.

Louisiana is the "Beirut of higher education" with its competing boards and schools, and it's impossible against that backdrop to make sweeping policy decisions about the future of the system in the next five weeks, Roemer said.

Roemer said there are only two alternatives to what he is proposing.

"One is to have the court do it, and I don't want to do that," Roemer said. "The other is to design a plan in the next five weeks. I don't believe any of the parties are ready to do that."

Roemer indicated his plan would bring discussion of the future of higher education from behind closed-door negotiating sessions among lawyers and allow public input.

Roemer said that, if the court approves his idea, he still plans to seek an amendment to change the state constitution and consolidate higher education boards.

Roemer said he doesn't know if the court can simply order such a change in the state constitution.

And, he said, if the electorate approves a change in the state constitution, it would obviate appeals of a court-ordered management consolidation.

Besides, Roemer said, "We want the people to speak on the issue."

Consolidate

Mergers depend on single board
9/19/88
Shreveport Times

Southern University-Shreveport Bossier Parish Community College and Shreveport-Bossier Vo-Tech all rolled into one? Initial reaction to a plan that would merge the three local higher education institutions was decidedly mixed, but the discussion is at least a start toward some things that must happen quickly: Formulation of a desegregation plan that works and creation of a single higher-ed board that will make it work.

Louisiana is under a strict deadline to come up with a new plan by Nov. 22 — just two months away — or a federal court will do it for us. All of this comes in the wake of a court ruling earlier this year that threw out a 1981 consent decree which, frankly, needed to be thrown out. Not only did the old decree cost the state a great deal of money, it also made very little difference in the racial composition of student bodies.

In throwing out the decree, federal judges suggested that a new plan should look at consolidation of some existing colleges and creation of a single higher education board for the state. The single-

board concept has been brought up several times in the state Legislature. It has yet to win approval, even though one board – instead of the four which now govern state institutions – would improve educational quality.

During discussion here Friday, another good reason for consolidating the boards became apparent. SUS President Robert Smith presented his college's plan to merge SUS with Bossier Community College and Shreveport-Bossier Vo-Tech – under Southern's administration.

The problem, though, is that SUS is governed by the Southern University Board of Supervisors and the Board of Regents; Bossier Parish Community College is run by the Bossier Parish School Board, which answers to the State Board of Elementary and Secondary Education; Vo-Tech comes directly under the BESE. Which, in all those governing structures, is going to give up jurisdiction over one of its institutions?

Technically, those under the BESE umbrella aren't really considered in the same category as the colleges supervised by a university board system. Because they are higher education in the sense of offering post-high school students, though, they have figured into desegregation plans – particularly when paired with a two-year school such as SUS.

They all might come together under some sort of state-wide plan for two-year community colleges. Gov. Buddy Roemer has already mentioned the possibility of creating a junior college system. Along with that, all the schools could be shifted to the general supervision of the single higher ed board. Without one board governing them all, though, devising a desegregation plan is going to fall inevitably into turf battles.

The discussion held here Friday among representatives from area colleges was part of a review process. A Northwest Louisiana subcommittee headed by Centenary's Dr. Donald Webb will report its findings to the Governor's Commission on Higher Education, with everyone racing the clock to meet the Nov. 22 deadline.

Whatever the panel's actual recommendations may eventually be, the general concepts presented here are pointing the right direction

— toward mergers, and especially toward consolidation of the state's higher boards.

State plan for colleges gets reprieve

by Dawn Ruth
Staff writer
2/25/89
Times Picayune

A federal court has rejected an attempt by the U.S. Justice Department to throw out the state's plan for desegregating public colleges in Louisiana.

The court ruled this week that the Justice Department's request to dismiss the state plan inappropriately interferes with the work of the court's specially appointed education expert, who is seeking to negotiate a desegregation agreement among the department, state officials and school representatives.

The court ruled in August that the state's racially divided system of public higher education violates civil rights laws, and it asked for proposals to integrate the schools. But plans submitted by Gov. Roemer's administration, the Justice Department, the state's predominantly black schools and others were found wanting by the court, which named the expert, or special master, to oversee a solution.

Special Master Paul R. Verkuil, a former Tulane University Law School dean who now is president of the College of William and Mary in Virginia, will begin hearings March 7 and recommend a desegregation plan by the end of the month.

The Justice Department asked the court last week to disregard the state's college desegregation plan, calling it "a plea to maintain the status quo."

Roemer's plan would replace the four-board system of state college management with a single superboard, and leave most desegregation decisions up to that board. The state plan also would establish a system of two-year colleges, and require tougher admissions requirements at some universities.

John Kennedy, special counsel to the governor, said he is pleased with the court's decision.

"The state believes its plan will desegregate higher education in an educationally sound way," Kennedy said. "We also believe that the Justice Department's plan will not.

"The Justice Department's plan is really a school destruction plan," he said. "It will lower the quality of education for all of our schools and it will stand Louisiana's system of public higher education on its head."

The Justice Department's plan focuses on establishing two new campuses and transferring programs from predominantly white schools to predominantly black schools.

Court: College desegregation depositions should be public

by Steve Cannizaro
Staff writer
3/2/89
Times Picayune

Pre-trial depositions in Louisiana's college desegregation case should be open to the public and not sealed, a federal special master ruled Wednesday.

Both the Justice Department and the Southern University System asked that pre-trial statements not be made public for fear they could be misinterpreted or embarrassing.

But Paul Verkuil, a former dean of the Tulane University Law School and now president of the College of William and Mary in Virginia, rejected their requests.

Verkuil met with attorneys for the state, federal government and the public universities to work out details for hearings, which start March 7.

Verkuil has said he will recommend a desegregation plan by the end of the month.

John Kennedy, attorney for Gov. Roemer, said he was pleased that Verkuil won't prevent depositions from being seen by the media and public.

"The students, parents and faculty of the schools and the state's taxpayers have a right to know every basis of a decision" in the case, Kennedy said of pre-trial testimony.

The Times-Picayune and Capital City Press in Baton Rouge jointly filed motions opposing sealing the transcripts.

Kennedy said the state will release the transcripts if no appeals are filed. None was filed Wednesday.

The court ruled in August that the state's racially divided system of public higher education violates civil rights laws. It asked for proposals from all sides to integrate the schools.

Plans submitted by Gov. Roemer's administration, the Justice Department, the state's predominantly black schools and others were found wanting by the court, which named Verkuil special master to oversee a solution.

Roemer's plan would replace the four-board system of state college management with a single superboard and leave most desegregation decisions up to that board.

It would also establish a system of two-year colleges and require tougher admission requirements at some universities.

The Justice Department plan focuses on establishing two new campuses and transfers some programs from predominantly white schools to predominantly black schools.

The battle is over a seven-year-old court agreement, or consent decree, between the state and federal government. In the consent decree, the state promised to erase the vestiges of segregation in its public college system and has spent $200 million to improve black schools to attract white students. But the federal court said it hasn't worked.

The federal judges on the panel, District Judges Charles Schwartz and Veronica Wicker and Appeals Court Judge John Minor Wisdom, have said a drastic change may be required.

It may require, they have said, reducing the number of four-year colleges with duplicate programs, setting up a system of junior colleges and giving a single board authority to run the state's colleges and universities.

The state now has one board that oversees the predominantly white Louisiana State University System, another that operates the predominantly black Southern University System, a third that operates other colleges and a fourth board coordinating the former boards.

Deseg plan's final briefs submitted

by Karen Didier
Capitol news bureau
Morning Advocate
4/2/89

Attorneys have submitted the final arguments on how to desegregate the state's colleges, with representatives of Southern University asking for $200 million to upgrade programs and facilities at its three campuses and lawyers for the state reiterating the governor's call for a single university governing board.

Briefs submitted by the Board of Regents and the LSU Board of Supervisors in the state's college desegregation lawsuit track that of arguments made by attorneys for the state.

The 15-year-old lawsuit is now in the hands of special master Paul Verkuil, who was appointed last December by a three-judge federal court to draft a desegregation plan for state colleges after attorneys in the case failed to reach agreement on a proposal.

In addition to a single governing board, which would replace the four boards currently in place, the state plans calls [sic] for:

•The assignment of a unique role, scope and mission by the single board to each institution.

•The establishment of entrance requirements at some institutions.

•The creation of a comprehensive community college system with a new community college in Baton Rouge.

•The elimination of unnecessary program duplication among institutions.

•The establishment of scholarships to attract black students to predominantly white schools and vice versa.

The cornerstone of the state's plan is the creation of the single governing board to take the place of the Southern University Board of Supervisors, the LSU Board of Supervisors, the Board of Regents and the Board of Trustees for State Colleges and Universities.

"The current multi-board and multi-system governance structure for higher education in Louisiana promotes, by its very existence, competitiveness and discord which has interfered in its effectiveness and has become destructive to higher education in Louisiana," state attorneys John Kennedy and Joseph Levin Jr. say in their argument to Verkuil.

The shortage of state funds for colleges, which has occurred as the result of a drop in oil prices, has turned institutions and boards against one another, the state argued.

The Southern University Board of Supervisors has adamantly opposed the one-board plan and continued to do so in its final argument to Verkuil.

"Higher education governance structure and higher education desegregation are separate issues. A successful plan of higher education desegregation does not depend upon a particular form of higher education governance," said Southern's attorney, state Sen. William Jefferson, D-New Orleans.

"A successful plan of higher education desegregation depends on commitment of resources and motivation to get the job done . . .", Jefferson said.

He argued that the state Board of Regents now has the authority to provide the oversight and management the state wants vested in the new single board.

However, in its brief to the court, Board of Regents attorney Peggy Woodward noted that the resistance to change exhibited by every college in the state can only be overcome by the creation of a single governing board.

"The present management boards are too wedded to their advocacy functions to subordinate institutional concerns to a statewide plan; and the Board of Regents is too weak to rein them in. A statewide plan, enforced by a single governing board, is Louisiana's only hope for pursuing desegregation without sacrificing quality," Woodward wrote.

Southern's desegregation plan focuses on the continued "enhancement" of its academic programs and facilities, and the transfer of high-demand programs from white schools to black institutions.

The state, regents and LSU argue against such directives.

Jefferson said that Southern's physical facilities and academic programs have not been as well-financed by the state as have those at white institutions.

Programs started under a 1981 state/federal desegregation agreement, known as the consent decree, were not given the support they needed, Jefferson said, leading to their failure to produce the desired result of attracting white students to the black campuses.

"The required enhancement of the physical facilities at the institutions of Southern University to reach the goal of comparability (with white schools) should be determined by following a comprehensive study, but should be no less than $65 million," Jefferson wrote.

He said Southern needs $125 million to permit its programs to receive the appropriate accreditation and "make the university more competitive for other-race students."

But Woodward argued for the Board of Regents that the consent decree programs and construction efforts at the predominantly black schools were more than adequately funded by the state during the six-year life of the decree.

As an example, Woodward pointed to Southern's nursing school, which was established under the consent decree.

In 1986-87, Southeastern Louisiana University in Hammond spent $903,751 on its nursing program, which enrolled 677 students. In the same year, Southern, which had one-tenth the students enrolled in its nursing program, requested $909,723 for the program but received only $464,795.

Woodward said the expenditures figure out to $7,377 per nursing student at Southern compared to $1,335 per nursing student at Southeastern.

"Perhaps the most telling argument against the claim that the predominantly black institutions were underfunded is the fact that they did not expend all the moneys appropriated to them," Woodward wrote. "For instance, from 1982-83 through 1987-88, Southern requested $68,767,709 in supplemental funding for consent decree programs. It is now complaining that it was appropriated only $50,418,193. Yet, during that same period, Southern expended only $44,247,648, returning the unspent balance of more than $6 million.

"It is difficult to understand how the system could have needed more when it was unable to spend all it had," Woodward argued.

Also, Woodward said the consent decree programs attracted very few white students to the predominantly black campuses and, in fact, made the black campuses more attractive to black students.

Over a seven-year period, Woodward said the white enrollment at predominantly black schools "increased from a negligible .3 percent to a negligible 1.2 percent."

However, during the same time period, black enrollments at predominantly white universities sharply declined from 57 percent in 1981 to 47 in 1988, Woodward wrote.

"Because this was a period of relatively stable black enrollments, it is apparent that the gains made at the predominantly black institutions were realized at the expense of predominantly white institutions . . . . Thus, the enhancements of the predominantly black institutions made them more attractive to blacks, not whites," Woodward wrote, adding that such results should "counsel against making the same mistake."

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§8. Attorney General; Powers and Duties

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

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§5. Governor; Powers and Duties

Section 5. (A) Executive Authority. The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.

(B) Legislative Reports and Recommendations. The governor shall, at the beginning of each regular session, and may, at other times, make reports and recommendations and give information to the legislature concerning the affairs of state, including its complete financial condition.

(C) Departmental Reports and Information. When requested by the governor, a department head shall provide him with reports and information, in writing or otherwise, on any subject relating to the department, except matters concerning investigations of the governor's office.

(D) Operating and Capital Budget. The governor shall submit to the legislature an operating budget and a capital budget, as provided by Article VII, Section 11 of this constitution.

(E) Pardon, Commutation, Reprieve, and Remission; Board of Pardons.

(1) The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, [FN1MV] may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. However, a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.

(2) The Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him.

(F) Receipt of Bills from the Legislature. The date and hour when a bill finally passed by the legislature is delivered to the governor shall be endorsed thereon.

(G) Item veto.

(1) Except as otherwise provided by this constitution, the governor may veto any line item in an appropriation bill. Any item vetoed shall be void unless the veto is overridden as prescribed for the passage of a bill over a veto.